Supreme Court of the United States

OCTOBER TERM, 1916.

No. 24.

EPHRAIM SIMON,

Appellant,

versus

SOUTHERN RAILWAY COMPANY,

Appellee.

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

Brief on Behalf of Appellee.

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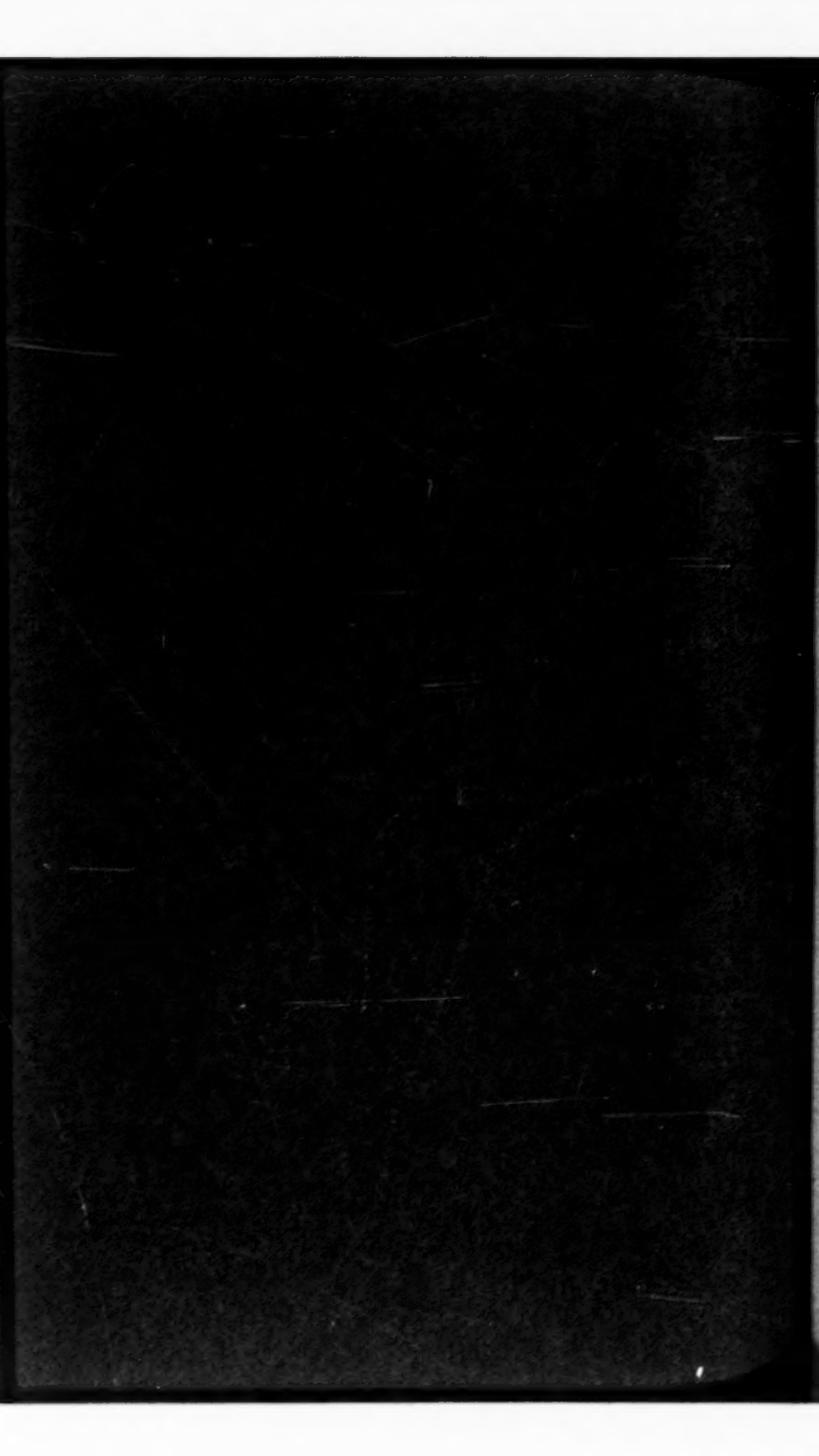

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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 34.

EPHRAIM SIMON,

Appellant,

versus

SOUTHERN RAILWAY COMPANY,

Appellee.

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

Brief on Behalf of Appellant.

STATEMENT OF THE CASE.

The appellant, Ephraim Simon, while being carried as a passenger on one of the regular passenger trains of the Southern Railway Company, sustained personal

injuries, and other damages, through a collision occurring between trains on the line of the Southern Railway Company, on February 8th, 1904. He filed suit in the Civil District Court for the Parish of Orleans, in the State of Louisiana, on December 1st, 1904, setting out in his petition his cause of action against the Southern Railway Company, together with the nature, character and extent of his injuries, and the items and quantum of his damages, and alleged that his said damages had occurred solely through the gross fault and negligence of the Southern Railway Company. (Rec., p. 8-14.)

Upon further setting out that the Southern Railway Company was a foreign corporation, "doing business within the City of New Orleans, in the State of Louisiana, without having designated or appointed any agent therein," upon whom process of citation might be served, as required by the law of said State, he prayed for service of citation upon the Secretary of State of the State of Louisiana, pursuant to the provisions of Section 1, of Act No. 54 of the Session of 1904, of the Legislature of Louisiana, specially praying "that said service so made be a service upon the said Southern Railway Company, as provided for in the act aforesaid." And he further prayed that after the legal delays and due proceedings, that he have judgment against said defendant, etc., with the further prayer for trial by jury, for costs and for general relief. (Rec., pp. 8-14.)

Citation in due form of law, under the seal of the Court, issued as prayed for, and was served by the Sheriff on December 3rd, 1904. (Rec., pp. 14-15.) The

Sheriff made return of service upon the citation, and duly filed the same, on December 6th, 1904. (Rec., p. 15.)

According to the statute law of Louisiana (Code of Practice, Art. 311), in the event of no appearance made by the defendant, or answer filed, default was due and could have been entered upon this process on December 15th, 1904. No appearance being made by the Southern Railway Company, and no answer having been filed, default was moved for and judgment by default was duly entered in open Court on January 10th, 1905, upon showing to the Court that the "defendant had failed to answer, though duly cited." (Rec. p. 15.) By the terms of the statute of Louisiana, judgment by default may be confirmed, and definitive or final judgment may be rendered in the cause on the third judicial day after entry of default. (Code of Practice, Art. 312.) So that, default in this cause having been duly entered, final judgment could have been rendered on the 13th day of January, 1905.

On January 16th, 1905, from a panel of jurors duly summoned in open Court, a jury of twelve men were drawn; witnesses for the plaintiff—including the plaintiff himself—were duly sworn before the jury; the jury were charged by the trial Judge; the foreman of the jury was selected and appointed by the Court, and the jury retired to deliberate on their verdict. (Rec., p. 17.) After deliberation the jury returned into Court, and, through their foreman, handed down the following verdict, endorsed on the reverse of the petition:

> "We, the jury, find in favor of the plaintiff in the sum of thirteen thousand three hundred and

forty-eight and 00/100 dollars, with interest and costs.

(Signed) "**Samuel Mohurter,**
"Foreman."

(Rec., p. 17.)

On motion of counsel for the plaintiff, the verdict was ordered recorded and judgment entered in accordance therewith. (Rec., p. 17.)

Judgment being entered and the judgment roll engrossed, the judgment was **read and signed** by the trial Judge in open Court on **January 20th,** 1905. This appears by the judgment roll as follows:

"Considering the **verdict of the jury** in this matter, and **that the demand of the plaintiff was proved,** the law and the evidence being in favor of said plaintiff:

"It is ordered, adjudged and decreed that the default herein entered on January 10th, 1905, be now confirmed and made final, and accordingly that there be judgment in favor of the plaintiff, Ephraim Simon, and against the defendant, Southern Railway Company, in the full sum of thirteen thousand three hundred and forty-eight ($13,348.00) dollars, with legal interest thereon from date of judgment until paid, and for costs.

"Judgment rendered in open Court January 16th, 1905.

"Judgment read and signed in open Court, January 20, 1905.

(Signed) "**W. B. Sommerville,**
"Judge."

(Rec. p. 17.)

All of the foregoing proceedings at law in the State Court are made to appear on the face of the record in this cause, as **exhibits to the bill of complaint.** (Rec., pp. 15-18.)

On February 6th, 1905, the Southern Railway Company, alleging itself to be a corporation, organized under the laws of the State of Virginia, and as such a citizen of said State, averring that it was "empowered to operate a line of railway in the State of Virginia, in the State of Mississippi and in other States, but not in the State of Louisiana," (Rec., p. 2), exhibited and filed its original bill of complaint in equity in the Circuit Court of the United States, for the Eastern District of Louisiana, against Ephraim Simon (now appellant), a resident of the City of New Orleans, State of Louisiana, and a citizen of said State. (Rec., pp. 1-7.) The sole object, end and purpose of this bill of complaint, as is shown upon the **face of the bill**, and upon the face of the **prayer** of said bill for relief, was as follows:

> "Your orator therefore prays that the said Ephraim Simon, who is plaintiff aforesaid, in said action at law, entitled 'Ephraim Simon vs. The Southern Railway Company,' No. 74,869, Civil District Court for the Parish of Orleans, his counsellors, attorneys, solicitors, or agents, **may be restrained by an injunction** issuing out of this Court, from **further proceedings** against your orator, **under the said suit and judgment**, or from issuing execution thereon, or attempting thereunder to seize any property, movable or immovable, of your orator, or **in any manner attempting to enforce the same.**" (Rec., p. 6.)

After formal prayer for process of **subpoena**, with waiver of respondent's oath, the bill proceeds to further specially pray:

> "That the **said injunction be made perpetual.**"
> (Rec., p. 7.)

The bill of complaint in this case is, therefore, plainly, on its face, an original, **independent injunction bill**, praying that "**the writ of injunction**" be "**granted**" by "**a Court of the United States, to stay proceedings in a Court of a State**" in the teeth of the literal terms of the Act of Congress of March 2nd, 1793, Chap. 22, Sec. 5, Section 720, Revised Statutes of the United States, and now Section 265 of the Judicial Code.

The averments will be fully analyzed and the contents of this injunction bill will be discussed in full hereinafter.

Upon the exhibiting of this bill of complaint on February 6th, 1905, with the **jurat** of A. B. Andrews, first vice-president of the Southern Railway Company, sworn to in Washington, D. C., of date January 31st. 1905, **couched in carefully guarded language** (Rec., p. 7), the United States Judge made the following order thereon.

> "Let the defendant show cause on Saturday, February 11th, at eleven o'clock A. M., why a preliminary injunction should not issue herein, and in the meantime, let a temporary restraining order issue herein, restraining and forbidding the said defendant from **proceeding** against complainant **under said suit and judgment**, or **attempting to enforce the same.**"
> (Rec., p. 7.)

After service of the restraining order and the order to show cause, the defendant duly entered his appearance to the bill, and filed a demurrer. (Rec., p. 24.) The rule for injunction was continued from time to time by the Court, and on June 7th, 1905, was heard and submitted on the **ex parte** affidavits and exhibits filed for complainant and defendant respectively. (Rec., pp. 81, 82, 83, 84.)

On June 9th, 1905, the District Judge holding the Circuit Court made the rule absolute, awarding the preliminary injunction, as prayed for by the bill. (Rec., pp. 85, 86, 87.)

On June 10th, 1905, the District Judge, **of his own motion**, made and entered an order appointing

> "Hon. Charles F. Buck to be Special Master in Chancery in this cause, with all of the powers possessed by masters in chancery. This cause is now referred to him and he is **specially authorized and directed** to hear and take all testimony and evidence in this cause and report the same to this Court, **together with his findings of law and fact on any and all matters which may come before him in this cause.**" (Rec., p. 88.)

The record shows that at the date of this order of reference to a master, the **demurrer, the only pleading filed by defendant, was still pending and undisposed of.** (See Record, p. 84.)

The demurrer, as appears by the record, was finally submitted to and overruled by the Court, on December 15th, 1906, and defendant was allowed time until the first Monday in February, 1907, in which to further plead or answer. (Rec., pp. 93-94.)

Defendant entered and filed his plea on February 5th, 1907, again challenging the **jurisdiction** of the Circuit Court, and its right and power to **sit in review on a judgment of the State Court.** (Rec., p. 94.)

The complainant filed a general replication to the plea on April 19th, 1907. (Rec., pp. 97-98.) The plea was on motion set down for hearing before the Court on May 27th, 1907, and on that date was heard and overruled by the District Judge holding the Circuit Court, who allowed the defendant further time to plead or answer until the first Monday in August, 1907. (Rec., pp. 98-99.)

A sworn answer, denying specifically any and all confederacy and all charges of fraud, set up in the bill, and denying specifically all matters of the bill, sought to be set up as equities, was filed on August 5th, 1907, under **protestation** and with **full reservation** of the matters set up in the demurrer and the plea. (Rec., pp. 99-107.)

On August 19th, 1907, complainant filed a general replication to the answer. (Rec., pp. 107-108.)

On November 11th, 1907, a rule for contempt was taken against the appellant, Simon, by the complainant, upon suggesting that Simon had disobeyed the injunction of the United States Circuit Court, by threatening to issue and by issuing execution upon his judgment obtained in the State Court. (Rec., pp. 109-114.)

To this rule Simon made respectful return, disclaiming any intentional or designed disrespect to the Court or its order, and after humbly and respectfully urging his rights vested in him under his judgment obtained in the State Court of the State of Louisiana, prayed to be discharged, upon suggesting that the trial Court's

order of injunction **was void for want of power and jurisdiction,** under the express terms of Section 720 of the Revised Statutes (now Section 265, Judicial Code) of the United States. (Rec., pp. 115, 116, 117.)

On November 15th, 1907, upon the hearing of the rule for contempt, the District Judge adjudged Simon guilty of contempt and imposed a **nominal** fine for disobedience of the order of injunction, and ordered Simon to stand committed for contempt and to be held by the United States marshal in custody until payment of the fine. (Rec., pp. 127-134.)

Simon thereupon applied, through his counsel, to the Supreme Court of the United States for a writ of **habeas corpus,** and a **certiorari,** and prayed to be released and discharged from custody. (Rec., pp. 134-142.)

Upon the final hearing and consideration of the matters set up by the appellant in his petition for **habeas corpus** and **certiorari,** the Supreme Court of the United States, at the October Term, 1907, handed down its opinion and decree, on January 26th, 1908, discharging the rule and denying the petition. **(Ex parte Simon, 208 U. S. 144.)** The grounds and reasons of this decision will be discussed in the argument on the assignments of error.

The special master to whom this cause had been referred, made up and filed on January 6th, 1910, a lengthy report of "his findings and conclusions of law and of fact, and upon any and all matters that came before him" and with it returned and made part thereof all of the testimony and evidence in the cause. (See terms

of order appointing Master, p. 88.) (See Master's Report, Rec., pp. 148-176.)

The "findings and conclusions of law and of fact" and of the "other matters that came before him," reported on by the master, will be discussed hereafter.

Exceptions were taken and filed to the report, by both the complainant and the defendant. The complainant excepted to the master's findings, only

> "in so far as the master finds and reports that the charges of fraud and bad faith, averred and indicated by the evidence submitted, are not sufficient to justify the annulment of the judgment of the State tribunal." (Rec., p. 277.)

The defendant filed elaborate and exhaustive detailed exceptions to the master's report, only in so far as it was prejudicial, both before the master himself, while he still held his report, and before the Circuit Court when the report was filed. (Rec., pp. 174-291.)

On February 4th, 1910, the defendant filed in the Circuit Court a formal motion to show cause why the order appointing the master should not be vacated and set aside, and why his report should not be stricken from the files of the Court on the ground that the Circuit Court, in the absence of a stipulated consent, entered into between the parties to said cause,, was without power or right to abdicate its authority or to impose or delegate any power upon a master in a cause of this nature, other than the bare authority to hear and take testimony and evidence of the respective parties to

the cause and to report such testimony and evidence to the Circuit Court, **without any findings of fact or conclusions of law.** (Rec., pp. 278-279- 291.)

On June 14, 1910, the cause came on to be heard before the Circuit Court on the motion to vacate the order appointing the master, and on the several and respective exceptions of the parties, complainant and defendant, to the master's report, and was argued before the Court and taken under advisement by the District Judge. (Rec., pp. 293-294.)

On November 25, 1910, the District Judge handed down and caused to be filed, a written opinion, disposing of the **entire cause,** holding that the Act No. 54 of 1904, of the Session Laws of Louisiana, providing for process of citation to a foreign corporation, **doing business in the State,** without any designated agent, through **service on the Secretary of State,** was unconstitutional, in that it was not due process of law, as guaranteed by the Constitution of the United States, and that the judgment of the State Court, based on **such service,** was consequently absolutely null and void. The District Judge thereupon held that it was unnecessary to pass upon the question raised by the order to vacate the master's report, and upon the questions raised by the exceptions to the report, and ordered a **FINAL DECREE** to be entered **perpetually enjoining the defendant,** as prayed for. (Rec., pp. 294-298.)

A **final decree, perpetually enjoining the defendant from enforcing the judgment** rendered by the State Court, was accordingly entered and signed on December 1st, 1910. (Rec., pp. 298-299.)

A motion of appeal, an assignment of errors and an appeal bond, approved by the Court, were thereupon filed by Simon in the Circuit Court, and an appeal from said final decree to the United States Circuit Court of Appeals for the Fifth Circuit was, thereupon, duly allowed. (Rec., pp. 299, 304.)

The Circuit Court of Appeals for the Fifth Circuit, having heard the appeal of Simon, handed down on March 5th, 1912, a memorandum opinion disposing of said appeal, in which the Court announced substantially the following conclusions:

1. That the Supreme Court of the United States had authoritatively decided the question of jurisdiction of the Circuit Court to entertain the bill of complaint of the Southern Railway Company, to stay proceedings in the State Court, on Simon's judgment, and that such decision was binding on the Circuit Court of Appeals until reversed.

> Citing Ex parte Simon, 208 U. S. 144;
> Marshall vs. Holmes, 141 U. S. 589;
> Gaines vs. Fuentes, 92 U. S., 10.

2. The Circuit Court of Appeals held that at the time Simon's petition was filed in the State Court, the Southern Railway Company was doing business in the Parish of Orleans, State of Louisiana.

3. That although the Southern Railway Company had not complied with the Louisiana Statute by naming or designating an agent within the State upon whom process of citation could be served, yet that service of process made upon the Assistant Secretary of State of Louisiana, as shown by the Sheriff's return in Simon's

case, was invalid and ineffective, and was not the method of service provided by the Louisiana Statute (Act 54 of 1904), requiring that service of citation must, in such case, be made upon the **Secretary of State**, and that, consequently, the judgment obtained by Simon in the State Court was absolutely void.

Thereupon, the Circuit Court of Appeals affirmed the judgment of the Circuit Court in this cause. (Rec., pp. 309-312.)

A petition for rehearing was denied on April 12th, 1912. (Rec., p. 326.)

The appellant thereupon filed his petition for appeal, his assignment of errors and his appeal bond, and an appeal was duly allowed in this cause to the Supreme Court of the United States. (Rec., pp. 327-328-329, 335.)

ASSIGNMENT OF ERRORS.

Ephraim Simon, the appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files herewith his assignments of error, as to which matters and things he says that the decree entered herein on the 9th day of April, 1912, is erroneous in this, to-wit:

I.

That the Circuit Court of Appeals erred in holding that the Supreme Court of the United States authoritatively

decided in **Ex Parte Simon, 208 U. S.**, that the Circuit Court of the United States had jurisdiction of the suit of the **Southern Railway v. Ephriam Simon**, and that the decision was binding and conclusive upon the Circuit Court of Appeals. Whereas, it appears from the opinion of the Supreme Court of the United States and the judgment dismissing the relator's petition for habeas corpus, that the Court did not determine the question of jurisdiction, and indeed declined to decide the question of jurisdiction in that proceeding.

II.

That the Circuit Court of Appeals erred in affirming the jurisdiction of the Circuit Court of the United States **ratione materiae**, and by its decree perpetuating the injunction issued by said Court staying proceedings in the State Courts of Louisiana and by the operation of said writ of injunction arresting the execution of the judgment of the State Court upon a matter of mere form.

III.

That the Circuit Court of Appeals erred in affirming the jurisdiction of the Circuit Court of the United States, based on the averments of complainant's bill that the judgment of the State Court was in its effect and operation violative of Article (1) Section (8), Paragraph (3) of the Constitution of the United States and of Section

(1) of the Fourteenth Amendment to the Constitution of the United States; and the Court erred further when by its decree in this cause it recognized the power and authority of the Circuit Court of the United States to annul a judgment of the Civil District Court of the Parish of Orleans, State of Louisiana, a Court of concurrent jurisdiction with the said Circuit Court of the United States.

IV.

That the Circuit Court of Appeals erred in assuming and asserting jurisdiction to enjoin the execution of a judgment of the State Court or to stay proceedings therein, in violation of Section 720 of the Revised Statutes of the United States, and of the uniform jurisprudence of the Supreme Court of the United States thereunder.

V.

That the Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States, which by its judgment annuled the judgment rendered by the State Court in a case wherein the State Court had jurisdiction **ratione materiae et ratione personae.**

VI.

That the Circuit Court of Appeals erred in reviewing and passing upon the mode of service of process in the

State Court, when the question of the mode of service of process was not raised upon the pleadings in the case, and the decision of the Circuit Court of Appeals on this point was **ultra petitionem.**

VII.

That the Circuit Court of Appeals erred in asserting and exercising jurisdiction in a case wherein it was absolutely without jurisdiction **ratione materiae.**

VIII.

That the Circuit Court of Appeals erred in passing upon the mode of service of process in the State Court and in declaring the same void, when the State Court had determined by its assertion of jurisdiction and its judgment thereunder, that the mode of services of process was legal and effective; the action and decision of the Circuit Court of Appeals in this regard was in disregard of the Seventh Amendment to the Constitution of the United States.

IX.

That the Circuit Court of Appeals erred in holding, in disregard of the Constitution of the State of Louisiana, and of the Statute Law of this State, that service

upon the Assistant Secretary of State was not a good and valid service, inasmuch as under the Constitution and Statutes of this State, of which the Circuit Court of Appeals was duly advised, the duties of the Secretary of State, during the latter's absence, may be discharged by the Assistant Secretary of State, who is, under the Constitution and laws of Louisiana, **pro hac vice** the Secretary of State.

X.

That the Circuit Court of Appeals erred in not according recognition to the assignments of error on the plaintiff's appeal from the United States Circuit Court, and which assigned errors were pertinent to the determination of the questions submitted to said United States Circuit Court of Appeals on the appeal from the United States Circuit Court, and particularly so as to the first, second and seventh assignments as embodied in this record.

XI.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, because the averments made by complainant for the purpose of seizing the equitable jurisdiction of the Court were merely colorable; the Court found on the

merits, first, that the defendant, in obtaining his judgment was free from the charge of fraud or ill-practices, and secondly, that the Southern Railway Company was doing business in Louisiana at the time Simon instituted his suit in the State Court against the company.

XII.

That the Circuit Court of Appeals erred in maintaining the complainant's bill and in perpetuating the injunction herein, because the bill having been stripped of all equitable grounds on the merits, all the basic facts having been found in defendant's (Simon) favor, the jurisdiction of the United States Circuit Court, sitting as a Court of Equity, was left barren, and the bill of complaint should have been dismissed.

XIII.

That the Circuit Court of Appeals erred in maintaining complainant's bill and in perpetuating the injunction herein, because a Court of Equity, State or Federal, is without power by its writ of injunction to enjoin a judgment of a Court of concurrent jurisdiction, merely because said Court differs in its interpretation of a Statute of a State; in this case in the interpretation as to the mode of service of process, namely, whether the service, under Act No. 54 of 1904 of the State of Louisiana, was

made upon the Secretary of State or his assistant—purely a legal question.

XIV.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, when it was demonstrated that no right of the complainant under the Federal Constitution was infracted or denied, and complainant's remedy at law in the State Court was clear, plain and adequate. (1) By action of appeal to the Supreme Court on the face of the service and citation, with the right in the event of an adverse decision, to a writ of error to the Supreme Court of the United States. (2) By an action of nullity in the State Court under Articles 605 and 606, Code of Practice of Louisiana, and then under Section 709 of the Revised Statutes of the United States, to the Supreme Court of the United States.

XV.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, because said Circuit Court was without jurisdiction **ratione materiae** to revise or review the judgment of the State Court, the State Court having decided that the mode of citation was valid and effective under the law of Louisiana.

XVI.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, because it has attempted to re-examine the question of fact tried and decided by a jury in an action at law in the State Court, which is contrary to the Seventh Amendment to the Constitution of the United States.

XVII.

That the Circuit Court of Appeals erred in maintaining the bill of complaint and in perpetuating the injunction herein, in that its judgment has in effect annulled and set aside the judgment of a State Court, in contravention of Article (4). Section (1) of the Constitution of the United States wherein the Courts of the United States are bound to give the judgments of the State Courts the same faith and credit that the Courts of one State are bound to give to the judgments of Courts of sister States.

XVIII.

And appellant assigns other errors apparent upon the face of the record.

Wherefore, appellant prays that said decree herein complained of may be reversed, and that appellant may have an adjudication and decree in his favor, in accordance with law and equity, and as herein specified.

ARGUMENT.

The first, second, third, fourth, fifth, sixth, seventh, tenth, thirteenth and fourteenth assignments of error will now be discussed.

I.

The fundamental and controlling question in this case is the question of jurisdiction: **Did the Circuit Court of the United States for the Eastern District of Louisiana have jurisdiction to entertain the bill and grant the only relief prayed for in said bill, to-wit, a writ of injunction to stay proceedings in a Court of a State? And did the Circuit Court of Appeals for the Fifth Circuit err in affirming the final decree of the Circuit Court maintaining such jurisdiction and granting such relief?**

The question of the jurisdiction of the Circuit Court in the cause at bar was raised in the trial Court below by demurrer, by plea and by the sworn answer. A discussion of the demurrer will show all of the grounds upon which the complainant sought to vest jurisdiction in equity, by its **original and independent bill**, exhibited in the United States Circuit Court. We, therefore, discuss, under the following two **sub-headings**, the jurisdiction, as it appears on the **face** of the bill, with the exhibits thereto, and then the bill on its **merits**.

Argument on the Demurrer.

The bill seeks to state a case in equity in the Federal Court on two grounds: First, the grounds of fraud, accident and mistake; second, the commerce clause of the Federal Constitution, which, it is averred, the State of Louisiana had violated by the terms of Act No. 54 of 1904, in seeking to regulate **interstate commerce**, if said statute be held to apply to a **foreign corporation, not** doing business in the State, and having no agent therein. This last ground has at no time been insisted upon by complainant, and is therefore to be considered as waived.

The bill does not aver that the Act 54 of 1904, of the Louisiana Legislature **(see Appendix)** is **unconditionally** unconstitutional. Nor does it aver that service thereunder upon a foreign corporation, **doing business in the State,** without having complied with said act—in failing to designate an agent for service of citation—would be violative of either the commerce clause or the Fourteenth Amendment to the Constitution of the United States. The **gravamen** of the bill is that the complainant was **not,** as a matter of fact, or as a matter of law, **doing business within the State of Louisiana.** The bill **does not charge** that the service of process is void, because made in this case on the Assistant Secretary of State. On the contrary, paragraphs 5, 6, 9 and 11 of the bill make it plain that the result sought to be reached by Simon, by his proceeding in the State Court—to wit, legal service on the corporation, under Act 54 of 1904—would

have been the same, whether service of citation had been made upon the Secretary of State, or upon the Assistant Secretary of State. The bill, on its face, plainly implies that, as matter of State law, service on the one was tantamount, in law, to service on the other. In another part of this brief this will be demonstrated to be the law of Louisiana under the Constitution, the Statute and the Jurisprudence. The record shows not only affirmatively, but with certainty, that the query or suggestion that service made upon the Assistant Secretary of State was not a compliance with the State statute—or that it was not due process of law under the Fourteenth Amendment to the Constitution of the United States—was a point raised by the master for the first time, in the rough draft of his report (Rec., p. 175)—a conclusion about which the master himself seems to have become doubtful, as a matter of law, when the report was ready to be filed in its completed form. (Rec., p. 163-164-165.) The District Judge—who dealt incidentally with the master's report, and who professed to treat it as "merely advisory"—in reaching the final decree appears to have disregarded the master's views and conclusions on this point.. (Rec., pp. 294-295-296.)

The Circuit Court of Appeals adopted the master's tentative conclusions as to the mode of service under Act 54 of 1904—which the master admits was a pure question of the interpretation of State law—holding that service on the Assistant Secretary of State was not tantamount in the law of the State to service on the Secretary of State, and overlooking the fact that this sole ground of its decision, was not only a mere question of

State law, arising on the face of the record of the State Court, but was ultra petitionem, of this bill of complaint, as both the master found and as the District Judge practically admitted and decided. (Rec., p. 295.)

It is well established that an injunction bill in the United States Courts, or in any Court of equity, does not lie to review mere errors of law of State Courts.

Nongue v. Clapp, 101 U. S., 551-554.

In the case at bar, the Circuit Court of Appeals pitched its decision solely upon the mode of service in this case, which was apparent on the face of the record in the State Court in Simon's case, holding contrary to the express decision of the State Court, that the service as actually made upon the Assistant Secretary of State, instead of the Secretary of State, who was absent at the time of service, was absolutely void under the State law.

Taking up now the so-called equitable matters of the bill, we proceed to examine its averments of fact and its conclusions.

THE BILL DOES NOT CHARGE EXTRINSIC OR COLLATERAL FRAUD.

This bill neither charges nor implies in any line, phrase, paragraph or set of words, any fraud or collusion committed by Simon in the process or method of service of citation in the suit in the State Court. It is not charged, hinted at or suggested, by any language in the bill, that Simon colluded with any official of the State, or of the Court, or with anyone else, in making or in seeking to

have service made under the Louisiana statute. Nor does the bill charge that Simon knew, when he filed his suit and sought to get service under Act 54 of 1904, that the complainant, a foreign corporation, was not doing business within the State, or that he practiced any fraud upon the Court in falsely claiming or pretending that the complainant corporation was doing business within the State. The statement, therefore, in the opinion of this Court in Ex Parte Simon, 208 U. S., 144, to the effect that the bill of the Southern Railway Company in the case at bar, "implies, at least, that the fictitious service" in Simon's case in the State Court "was made with deliberate fraud," we have been unable to justify by fair analysis of the averments of the bill. Nor does the bill contain any averment of fact tending to show—nor does it imply—any violation of an agreement between Simon and the Southern Railway Company, to the purport or effect that Simon would not bring suit; nor that he would not take judgment in such suit; nor that he would not seek to execute the judgment. Nor does the bill aver or set up any extrinsic or collateral act whatever, as having been done by Simon, that would make it inequitable for Simon to execute the judgment. The vague, indefinite and legally unmeaning conclusions of fraud, are, by the terms of the bill, limited and confined specifically to the alleged "surreptitious" filing of the suit, (a meaningless allegation) to the alleged "unconscionable" amount of Simon's demand, to the items specified as damages in his petition, which are said to be "not recoverable at law," and to the alleged "fraudu-

lently procuring and causing to be entered a verdict in the amount claimed in the petition," and to the alleged "subterfuge and fraud" of Simon in claiming and adducing "false testimony" to the effect that he had sustained damages in the amount sued for.

A thorough analysis of the bill will show that the statements in the foregoing sentence, comprehend and embrace everything that could be termed a fraud allegation in this bill. Under the well-settled authorities—there being no definite specification, no clear and distinct statements of external facts, but only mere epithets, invectives and highly colored adjectives or bare conclusions—a bill couched in such terms is demurrable, because such matters, not being well pleaded, are not admitted by the demurrer to be true.

Kent vs. Canal Co., 144 U. S. 91.
Fogg vs. Blair, 139 U. S. 127.
Life Association vs. Lohmiller, 74 Fed. 23.
Trust Co. vs. Folsom (opinion by Justice Lurton), 75 Fed. 929.

Moreover, all of the foregoing matters, characterized by the epithets "surreptitious," "fraud," "fraudulent," "subterfuge" and "unconscionable," are intrinsic matters, on their face and were tried and passed upon by the jury, and were foreclosed by the verdict of the jury and the judgment roll of the State Court, as the bill shows. It is now, and, for many years past, has been the settled doctrine of the courts of equity, that the character or species of so-called frauds, or of so-called fraudulent acts, of which a Court of equity will take cognizance, in

giving relief from a judgment or proceeding at law, are only such matters as are **extrinsic and collateral.**

U. S. vs. Throckmorton, 98 U. S., pp. 61, 65, 66, 67, 68, and authorities there cited.

U. S. vs. Flint et al., 4 Sawy. Cir. Ct. 42; S. C. 25 Fed. Cas., p. 1107.

Equally unfounded is the ground of attack that the damages claimed were not legally allowable. The mere fact that a question might arise with respect to the rule of damages as to which **Courts might differ,** does not warrant the institution of a suit in one Court to set aside a judgment obtained in another Court, founded in part on the application of a **debatable rule** of damages or evidence.

Simon's claim in the State Court and its allowance are amply justified by so excellent an authority as **4 Southerland on Damages (3rd Ed.) Section 1246,** and the authorities there cited.

It is certain that the complainant, on the face of the bill, under all of the authorities, has made no showing for relief in a Court of equity, upon the socalled fraud averments nor has it even made any showing by such averments as are set up in this bill, for the statutory action of **nullity,** under the terms of Article 607 of the Louisiana Code of Practice. We have been unable to find a **single case in the Louisiana jurisprudence holding that an averment to the mere effect that false testimony** was the basis of the **quantum or amount of a judgment complained of,** is ground for an action to **annul** such judgment in the

same Court which rendered the judgment complained of, under the Louisiana practice.

See McMicken vs. Millaudon, 2 La. 180.

Nor will there be found any such decision in the jurisprudence of this Court maintaining a bill in equity to impeach a judgment at law upon the general charge of false swearing.

The only other shred, vestige or pretense of a ground on which it is attempted to base equitable jurisdiction in the entire bill in the case at bar, is the averment that the complainant was prevented and precluded from making defense to Simon's suit in the State Court, by the alleged accident or failure to receive notice of the pendency of the suit and of Simon's demand therein, by service of citation upon the **Secretary of State** (Rec., p. 5, paragraph 11), and the further averment that this so-called accident, failure or mistake was "unmixed with any fault or negligence of complainant." These averments are mere conclusions of law. They have no meaning or force whatever, **in this case**, unless they are taken in connection with the averments that **complainant was a foreign corporation, not doing business within the State, and having no agent therein**, and unless **averred in connection** with some **extrinsic fraudulent act on the part of Simon, in deceiving or tricking the Court**, as to the mode of service employed or adopted by Simon, or of **concealing or causing to be concealed** from the Southern Railway Company, notice of the filing of suit or notice of the service of citation on the Secretary of State, which is not the case here. **No such fraudulent act of Simon is charged or implied in this bill.** The averments of the

bill as to doing business within the State are contradicted by the exhibits annexed to the bill, to-wit: The face of Simon's petition, where he distinctly avers that the Southern Railway Company, a foreign corporation, is doing business in the State, without having complied with the law, and by the verdict of the jury and the judgment thereon, from which it appears that such matter of fact set up by Simon in his petition was presented to, tried by and necessarily involved in, both the verdict and the judgment of the State Court, which expressly found "that the demand of the plaintiff was proved." The legal purport of these exhibits and the facts which they involve and embody, must therefore be read into this bill and treated as facts stated by the bill, or as admitted by the bill, since they are not traversed or denied by any appropriate language or averment in the bill—there being, as above stated, no averment in the bill to the purport or effect that Simon, by any act whatever, committed any fraud upon the trial Court, or upon the complainant, in fraudulently procuring the State Court to take jurisdiction of a case where Simon knew that the Court had no jurisdiction, either as matter of fact or as matter of law, or by concealing from the Southern Railway Company, by collusion, the fact that citation had issued and had been served on the Secretary of State, or was on file in his office.

These matters were, therefore, also intrinsic in the case at bar, since they were, of necessity, facts tried by a jury in the State Court, or were pure conclusions drawn by the State law therefrom, and were the basis and the only basis of the jurisdiction of the Civil District Court

(the State Court) in Simon's case, as is shown **on the face of the petition filed by Simon in the State Court.** (See exhibits to the bill, Rec., pp. 6-14.)

If complainant, as a matter of fact, **was doing business in the State** (which is vaguely denied in its bill), and which the jury found, **as a matter of fact,** as the exhibit to the bill shows, and if complainant **had no designated agent within the State, selected by it for the special function of service of citation** (which the bill admits), and which the jury also found, as the bill further shows, then complainant **was amenable to the State statute of Louisiana** (Act 54 of 1904), by the express terms of the Statute, and the jurisdiction of the Civil District Court **attached,** both as a matter of fact and as a matter of law, and **these very facts** were presented to, were tried, and were found by, the jury against complainant, by the very terms of the verdict and the judgment of the State Court, when read in the light of the State statute, as the bill and exhibits show on their face. The failure of the complainant, a **foreign corporation doing business within the State,** to select a specially designated agent for service of citation, was **its own negligence, or deliberate disregard** of the State law, and made the State law operate **ipso facto,** whereby the State **selected, with the legally presumed consent of the Southern Railway Company, the Secretary of State** as the Special officer or agent of the corporation upon whom service of citation might be made, just as though the agent selected by the State were **the proper officer** selected by the corporation itself. So that, up to this point, the **whole bill and all of its averments and charges,** are matters **wholly intrinsic**—that is

to say, they were, as shown by the bill, or as necessary conclusions of law drawn therefrom, necessarily involved in, and were necessarily tried and passed on by the jury and by the judgment of the State Court. This is the whole case as presented **on the face of the bill of complaint, under the indefinite fraud allegations.** The bill, therefore, does not state any case of "deliberate fraud," for the intervention of a Court of equity as a matter of **equitable jurisdiction.**

What Did Ex Parte Simon, 208 U. S., 144, Authoritatively Decide?

Ex parte Simon, 208 U. S. 144, does not purport to **"authoritatively decide"** that the Circuit Court had jurisdiction of the bill as a Court of Equity in the case at bar. All that can be fairly said to have been decided in **Ex parte Simon** is that a proceeding by **habeas corpus** was not the proper proceeding **to test the jurisdiction of** the Circuit Court in a case where a merely nominal fine had been imposed by the Circuit Court for failure to obey the preliminary order of the Court. This Court merely first **"assumed"** that the Circuit Court had jurisdiction in **Ex parte Simon,** and then **argued** that the jurisdiction **existed** at least for the purposes of the **preliminary** order, and then **concluded** with the suggestion that as there was enough alleged to amend by, the bill could be amended so as to **"give jurisdiction to the Circuit. Court."** (P. 148.) The sole precedent or authority cited for the "assumed" jurisdiction is **"Marshall vs. Holmes, 141 U. S. 589, and the earlier cases cited**

in that case." We respectfully submit that when fairly and fully analyzed, neither **Marshall vs. Holmes**, nor **Barrow vs. Hunton, 99 U. S. 80, nor Gaines vs. Fuentes, 92 U. S. 10**, were authority for the **issuing of the injunction**, which was the sole matter in contest in **Ex parte Simon**, as being without the jurisdiction of the Circuit Court, under the Revised Statutes, Sec. 720. Nor was **Johnson vs. Waters, 111 U. S. 640**, which was a creditors bill; nor **Arrowsmith vs. Gleason, 129 U. S. 86**, which was a bill brought by an infant to set aside a fraudulent sale of the infant's land, authority for the **issuance of an injunction** to stay proceedings in the State Court, notwithstanding the prohibitory terms of **Section 720, U. S. Rev. Stat. (Sec. 265, Judicial Code)**. The **power to issue the injunction, the only relief prayed for, and the power to punish for contempt, were the vital matters involved in** Ex Parte Simon, and these **grave questions**, this Court, upon well settled authority and ample precedent, **refused to adjudge upon Habeas Corpus**, in advance of full and regular hearing.

In none of the cases cited in Marshall vs. Holmes was any injunction issued by the Circuit Court of the United States. Nor did any of these cases properly involve the **power** of the Circuit Court to issue an injunction. **Gaines vs. Fuentes, Barrow vs. Hunton** and **Marshall vs. Holmes were all Louisiana removal cases, and the only Federal question fairly presented for decision in these cases, and actually decided, as a Federal question, was the right of removal. In Marshall vs. Holmes there was no removal** to the Federal Court. In **Barrow vs. Hunton, 99 U. S., 80,** the case was **remanded** to the State Court, **follow-**

ing the State Court decision, which held that the case was **not removable.** See **Goodrich vs. Hunton, 29 La. An.,** 372. The case of **Gaines vc. Fuentes, 92 U. S., 10,** is **sui generis,** and its **removability** (the only Federal question involved) was seriously doubted. See dissenting opinions of Mr. Justice Bradley, Chief Justice Waite, and Mr. Justice Swayne. See also **Fuentes vs. Gaines, 25 La. An., 80, 95,** and **Goodrich vs. Hunton** where the State Court said that **Fuentes vs. Gaines** was not a removable controversy by its very **nature,** since it was a **probate** matter and was an **ancillary** proceeding in the probate Court. The two State Courts, both the trial Court and the Court of Appeal of Louisiana, **held** that the case of **Marshall vs. Holmes** was **not removable,** and, thereupon, the two State Courts decided the case **on its merits,** and denied Mrs. Marshall relief in her action of nullity. On writ of error to this Court it was held that the suit or controversy presented by Mrs. Marshall's equitable action of nullity **was removable,** since she was a citizen of the State of New York, and the defendants were citizens of Louisiana, and, there being diversity of citizenship, the case should have been removed, and, hence, that all of the orders and decrees made by the State Court, after the petition for removal was filed, were properly without the jurisdiction of the State Courts. Thereupon, the decision of the Louisiana State Court of Appeal was reversed. It may be doubted whether **Marshall vs. Holmes** is now authority even on the question of the right of removal, since the decision of this Court in the case of **Illinois Central R. R. Co. vs. Shegog, 215 U. S. 308,** where

the right of removal was denied by this Court after two Courts of the State of Kentucky had passed on the right of removal and had decided the case on its merits, although the railroad company had actually removed the case to the Federal Court and although the Federal Court had rendered a judgment upon the verdict of a jury therein, before the Court of Appeals of Kentucky had acted. See also, Railroad Company vs. Street, 217 U. S., 599. However, Marshall vs. Holmes did not involve any question of the jurisdiction of the Federal Court to make any order after removal, for the mere reason that the case was not removed. Hence, everything that was said in that case about what the Federal Court would have had power to do, or what it ought to do after the case was removed, was merely obiter dictum, and, besides, in Marshall vs. Holmes, the petition for removal was not filed until after the State trial Court had issued a preliminary injunction, which is usually coupled, in the Louisiana practice, with an action of nullity. So that, upon removal, if the trial Court had made the order of removal, there would have been no necessity for the Federal Court to issue any injunction to stay proceedings on the twenty-three judgments recovered by Mayer against Mrs. Marshall in the State Court.

See Watson vs. Bondurant, 103 U. S., 281, 287.

Ex parte Simon also "assumes" that an injunction was issued by the Circuit Court of the United States in Marshall vs. Holmes, an assumption that is not borne out by the report of the case.

Nor does **Ex parte Simon** "authoritatively decide" that the bill in this case, warrants the issuance of an injunction to stay proceedings in a State Court or that it stated a case for equitable intervention. The Court expressly **declined** to determine whether the bill would be "**good or bad on demurrer.**" All it **intimates** is that there were efforts and attempts to allege jurisdiction in equity which **might** be sufficient to state a **case** in equity if the bill were properly **amended**, so as to state a case of jurisdiction, and that there was "at least **color of right**" for the preliminary injunction, and that there would be **time enough** to discuss the **merits of the bill** if the case came here after **final decree**. This, we submit, is the sum and substance of all that is "decided" in **Ex parte Simon**, and all that it **purports** to decide. The plain hint to the complainant that the bill ought to be amended, so as to state, if possible, a clear and distinct case "to give the Circuit Court jurisdiction," seems to have been entirely lost on complainant, because it ignored this hint in failing to amend its bill, though it had ample time and opportunity to do so. Hence, it is fair to conclude that it was **not possible** for the complainant to truthfully state its case, for **jurisdiction of the Circuit Court**, in any fuller or better terms than it has done by its original bill.

THE FEDERAL STATUTE BEING A PROHIBITORY STATUTE IS A CONCLUSIVE BAR TO FEDERAL JURISDICTION.

We have shown above that the bill is plainly demurrable **as it stands**, viewed simply **as a case in equity**. We now

proceed to show that it is demurrable merely because it is an original independent injunction bill, whose sole purpose and whose sole prayer is to "stay proceedings in a State Court" by a writ of injunction "granted" "by a Court of the United States." There being no pretense that this is a proceeding in bankruptcy, nor a case where the Circuit Court issued an injunction in aid of its prior jurisdiction, nor a case of which the Circuit Court had exclusive jurisdiction, it does not matter whether the State Court, as a matter of law, or as a matter of fact, had jurisdiction over the parties in the suit at law in the State Court; whether its proceedings were voidable or void for fraud, or for want of form; nor whether or not such proceedings were the result of error of law or error of fact. The writ of injunction issuing from a Court of the United States, a Court of concurrent jurisdiction with the State Court, is not the proper procedure UNDER THE LAW OF THE LAND, by which to test the power of the State Court, or its proceedings thereunder, or its jurisdiction to render the judgment complained of, or to stay proceedings therein or thereupon. There is a long line of emphatic and unequivocal decisions by this high tribunal, maintaining this proposition, from the earliest times down to the close of the last term of this Court, without a single break—in nearly every conceivable kind of a case. And we submit that, under these conclusive authorities, the injunction granted by the Court below upon this bill cannot be sustained, although in an appropriate action the Federal Court would have had jurisdiction by virtue of the diversity of citizenship, to grant equitable relief from a fraudulently obtained judgment.

See **Johnson vs. Watters, 111 U. S., 640; Arrowsmith vs. Gleason, 129 U. S., 86.** This Court has never countenanced the issuance of an injunction to stay proceedings in a State Court, except where the Federal Court's jurisdiction first attached, and then for its protection, or where the Federal Courts were invested by some act of Congress with exclusive jurisdiction.

Diggs vs. Walcott, 4 Cranch, 179.
Peck vs. Jenness, 7 How. 612.
Randall vs. Howard, 2 Black, 585.
Watson vs. Jones, 13 Wall. 679.
Riggs vs. Johnson County, 6 Wall. 195.
Carpenter vs. Haines, 91 U. S., 254.
Dial vs. Reynolds, 96 U. S. 340.
Watson vs. Bondurant, 103 U. S. 281-287.
Sergeant vs. Helton, 115 U. S. 348.
Lawrence vs. Railroad, 121 U. S. 634-636.
Moran vs. Sturgess, 154 U. S. 268.
In re Chetwood, 165 U. S. 443.
Bank vs. Stevens, 169 U. S., 432.
Harkrader vs. Wadley, 172 U. S. 170.
Chapman vs. Brewer, 114 U. S. 158.
Illinois Central Railroad Company vs. Sheegog, 217 U. S. 599.
Hull vs Burr, decided at the October Term, 1913.
See, also, Ewing vs. City of St. Louis, 5 Wall. 413.
Nougue vs. Clapp, 101 U. S. 551.

Diggs vs. Walcott, 4 Cranch, 179, was a suit in chancery, brought in a State Court, to enjoin, on the ground of extrinsic and collateral fraud, a judgment recovered in a suit at law, in the State Court. The suit in chancery was removed from the State Court into the Circuit

Court of the United States, **where an injunction was issued,** in accordance with the bill. An appeal was taken from the Circuit Court to the Supreme Court of the United States, where it appears that the cause was argued upon its merits, but, says the report, "The Court being of opinion that a Circuit Court of the United States **had not jurisdiction to enjoin proceedings in a State Court,**" the decree was reversed.

In **Peck vs. Jenness, 7 How. 612-625,** this Court, speaking by Mr. Justice Grier, said:

> "The act of Congress of the 2nd of March, 1793, Chap. 66, Sec. 5, declares that a writ of injunction shall not be granted 'to stay proceedings in any Court of a State.'
>
> "In the case of **Diggs vs. Walcott, 4 Cranch, 179,** the decree of the Circuit Court had enjoined **the defendant** from proceeding in a suit pending in a State Court, and this Court reversed the decree, because it **had no jurisdiction to enjoin proceedings in a State Court.** It follows, therefore, that the District Court had no supervisory power over the State Court, either by injunction or the more summary method pursued in this case, unless it has been conferred by the Bankrupt Act."

In the case of **Watson vs. Jones, 13 Wall., 679,** Mr. Justice Miller, speaking for the majority of the Court, said (p. 719):

> "And the act of Congress of March 2, 1793, as construed in the cases of **Diggs vs. Walcott** and **Peck vs. Jeuness,** is **equally conclusive** against

any injunction from the Circuit Court forbidding the defendants to take the possession which the unexecuted decree of the Chancery Court requires the marshal to deliver to them."

The Judges who dissented in this case did not rest their dissent on the ground that the Circuit Court of the United States **had power** to issue an injunction to stay proceedings in the State Court. On the contrary, Mr. Justice Clifford, speaking for himself, as well as for Mr. Justice Davis, who concurred in his dissent, p. 737, said:

"I am of the opinion that the Circuit Court had no jurisdiction to hear and determine the matter in controversy, as there were two courts of common law exercising the same jurisdiction between the same parties in respect to the same subject-matter within the same territorial limits and governed by the same laws. * * * State Courts and Circuit Courts in such cases are Courts of concurrent and co-ordinate jurisdiction, in respect to which the principle is that 'whenever property has been seized by an officer of the Court, or put in his custody by the process of the Court, the property will be considered as in the custody of the Court and under its control for the time being, and that no other Court has a right to interfere with that possession unless it be some Court which may have a **direct supervisory control** over the Court whose process has first taken possession, or some **superior jurisdiction** in the premises.' **Buck vs. Colbath, 3 Wall. 341.** Decided cases asserting that principle and enforcing it, are **very numerous** in the reported decisions of this Court, and also in

the reported decisions of other Courts of the highest respectability."

Citing Hagan vs. Lucas, 10 Peters, 400.
Taylor vs. Carryl, 20 How. 594.
Freeman vs. Howe, 24 How. 500.
Payne vs. Drew, 4 East. 523.
Peck vs. Jenness, 7 How. 612.
Evelyn vs. Lewis, 3 Hare, 472.
Noe vs. Gibson, 7 Page, 513.
Russell vs. East Anglian Ry. Co., 3 McNaughton & Gordon, 104.

In **Carpenter vs. Haines, 91 U. S. 254,** Mr. Justice Bradley, in delivering the unanimous opinion of the Court, said:

"A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents **some matters of equitable consideration,** they are so mixed up with others of a different character, or which cannot be entertained by the Circuit Court of the United States, and which constitute the main object and purpose of the suit, as to make the bill essentially **bad on demurrer.** In the first place, **the great object of the suit is to enjoin and stop litigation in the State Courts and to bring all the litigated questions before the Circuit Court.** This is one of the things which the **Federal Courts are expressly prohibited from doing.** By the act of March 2nd, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a State Court. This prohibition is repeated in Section 720 of the Revised Statutes, and extends to **all cases except where otherwise provided by the bankrupt law.**

This objection alone is sufficient ground for sustaining the demurrer to the bill."

In **Dial vs. Reynolds, 96 U. S. 340,** Mr. Justice Swayne, speaking for the whole Court, said:

> "The gravamen of what is desired as to Reynolds, is an injunction to prevent his proceeding at law in the State Court. Without this all else is of no account. Any other remedy would be unavailing. Such an injunction, except under the Bankrupt Act, no Court of the United States can grant. With this exception it is expressly forbidden by law. **Act of March 2nd, 1793, Sec. 5, 1 Stat. 334. Rev. Stat., Sec. 720; Diggs vs. Wolcott, 4 Cranch, 179; Peck et al., vs. Jenness et al., 7 How., 612; Watson vs. Jones, 13 Wall. 679."**

In **Sargent vs. Helton, et al., supra,** where a sale of lands of a **bankrupt estate** had been made and confirmed by the order of the Bankruptcy Court, and the lands had been conveyed by the assignee in bankruptcy, it was held that the Circuit Court of the United States was without jurisdiction at the suit of the **purchaser** to enjoin **a sale of the same lands** about to be made on the order of a State Court. In this case Mr. Justice Woods, delivering the unanimous opinion of the Court, said:

> "The sole purpose of the bill in this case was to restrain the execution of an order of the Circuit Court for the County of Escambia, a Court of the State of Alabama, and **no relief which, upon the averments of the bill, this Court could grant would be effectual without the writ of injunction prayed for.** The Circuit Court of the United States was,

therefore, **deprived of power** by the section just quoted, to protect the rights of the plaintiff, unless the writ of injunction was authorized by the law relating to proceedings in bankruptcy. **Haynes vs. Carpenter, 91 U. S. 254; Dial vs. Reynolds, 96 U. S. 340.** In a timely suit brought by the **assignee in bankruptcy**, there is no doubt that upon a **proper showing** the Circuit Court might have enjoined proceedings in the **attachment suits** in the State Court. This is the express ruling in **Chapman vs. Brewer, 114 U. S., 158.** But the plaintiff in this case is **not** the assignee in bankruptcy. Sullivan, the transferee of Sargent, the vendee at the bankruptcy sale, was the **real** plaintiff, and the only party who at the final hearing asked for the injunction. The question, therefore, is: Does any law relating to proceedings in bankruptcy authorize an injunction at the instance of a purchaser of property at the bankrupt sale, or his vendee, to stay proceedings in a State Court? There is no act of Congress expressly authorizing a Circuit Court of the United States to restrain by injunction, **even at the suit of an assignee in bankruptcy, proceedings in a State Court.**"

The Court, then, quoting from **Chapman vs. Brewer, said:**

"The case makes it clear that the injunction to stay proceedings in a State Court is only allowed by the statute for the purpose of **aiding the assignee in bankruptcy to discharge his duty** and of **protecting the property of the bankrupt estate for the equitable distribution among the creditors.** But there is no act of Congress from which can be inferred authority to a Court of the United

States to issue an injunction to restrain proceedings of a State Court at the instance of a purchaser at a bankruptcy sale or of his vendee."

In distinguishing the case of **Dietsch vs. Huidekoper, 103 U. S. 494**, the Court said that case

"merely decided that a Court of the United States **could enforce its own judgment** in a **replevin suit removed from a State Court** by enjoining the defeated parties from proceeding on the replevin bond **in the Court from which the cause had been removed**, the condition of the bond having been **satisfied** by the judgment of the Federal Court in favor of the obligor. The Court further held that the bill filed for the purpose of restraining the defendant was merely **ancillary** to the replevin suit, its object being to secure to the defendant therein the fruits of his judgment. The authority cited does not **tend to sustain** the jurisdiction of the Court in this case." (Black letters ours.)

In **Lawrence vs. Railroad Company, 121 U. S. 634**, Chief Justice Waite quoted the following language from **Bondurant vs. Watson (supra)**:

"If Watson had filed the petition for injunction in the State Court, and, **before it was allowed**, had petitioned for a removal of the cause to the Circuit Court with the design of applying to that Court for his injunction, the objection to the right of removal would have force. **That would have been an evasion of the statute.**"

The Chief Justice, after making the foregoing quotation, then proceeds to say:

"Such clearly **is this case**. The petition for removal was filed by the party who brought the **suit**,

> and there is nothing whatever in the record to show that the injunction she asked for was ever granted by the Court or by any Judge thereof prior to the removal. * * * Under the circumstances, therefore, the case is to be treated as having been taken to the Circuit Court to get an injunction, and not after one had been granted. This we have no hesitation in saying cannot be done, and without deciding whether, under any circumstances, a proceeding such as this was in the State Court can be removed to a Circuit Court, we affirm the order to remand."

Nearly all of the above authorities are cited and referred to as the undoubted law in the case of **Hull vs. Burr**, decided at the last term. See Advance Opinions, United States Supreme Court, October Term, 1913, decided June 22, 1914. Attention is called to the striking difference between the vague and general terms of the prayer of the bill in the **Hull case** and the pointed and specific terms of the prayer of the bill in the case at bar. In the **Hull case**, Mr. Justice Pitney, in speaking of the prayer, said:

> "As already mentioned, the specific prayer is that defendants may be restrained from asserting or claiming as trustee in bankruptcy in 'any Court or place any right, title or interest in' the property. There is a prayer for general relief, but it was pointed out by the Circuit Court of Appeals (207 Fed. 534-544) that no right to relief other than by way of an injunction was brought to the attention of the District Court or of the Court of Appeals upon the hearing. The general prayer should, therefore, be treated as abandoned."

Dealing with the merits of the case, in respect to the relief asked, the opinion then proceeds:

> "So far as the action already pending in the Florida Court of equity is concerned, the case is clearly within Section 720, **Rev. Stat., U. S. Comp. Stat., 1901, p. 581, Sec. 265 Judicial Code; 36 Stat. at L. 1162, Chap. 231; U. S. Comp. Stat. Supp. 1911, p. 236.** 'The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' • • • It is quite evident that the injunction sought by the present complainant is not one authorized by the Bankruptcy Act. The prohibition against injunction to stay proceedings in State Courts originated in the Acts of March 2nd, 1793, and has been constantly observed by the Court."
>
> **Citing Diggs vs. Wolcott, and the other authorities above referred to.**

To the suggestion that the term "any Court" in the prayer of the bill might refer to or include other Federal Courts, he said:

> "It is sufficient to say that the bill is devoid of any showing that defendants are asserting claims against complainant's title in any Court other than the Florida State Court; hence, there is no occasion to invoke the general rule that the Court first obtaining jurisdiction of a controversy should be permitted to proceed without interference. **Peck vs. Jenness, 7 Howard, 612-624; Central National Bank vs. Stevens, 169 U. S. 432, 459; Bigelow vs. Old Dominion Copper Mining & Smelt-**

ing Co., 74 N. J. Eq. 457, 473, et seq., 71 Atl. 153.

"We deem that the **main object** of the bill to which **all else is incidental** is in contravention of Section 265 of the Judicial Code (formerly Section 720 of the Revised Statutes)."

The doctrine announced by this Court has been followed with practical unanimity by the Circuit Courts and the Circuit Courts of Appeal, the glaring exception being the opinion of Circuit Judge Sanborn in the **Surety case (120 Fed. Rep.,. 598)**, where the doctrine of the leading case of **Peck v. Jenness** was studiously ignored.

In the instant case the Circuit Court of Appeals misapprehended the opinion of this Court in **Ex Parte Simon**.

Independent reasoning or argument is unnecessary to give support or strength to the uniform jurisprudence of this Court. We cannot, however, refrain from quoting the persuasive language of the late Mr. Justice Lurton when sitting as a member of the Court of Appeals.

In the case of the **Southern Bank and Trust Co. vs. Folsom, 75 Fed., 929**, this learned Judge said:

"The injunction restraining the execution of the decree of the State Court was equally unwarranted, and was in violation of the provisions of Section 720 of the Revised Statutes of the United States. That the land ordered to be sold was property of the suitor invoking the injunctive process of the United States Court is no justification. The binding force of that very wise and conservative Statute does not depend upon the real or ultimate rights of the respective claimants of the property involved, or the regularity of the proceedings

sought to be stayed. The Statute prohibits any injunctive restraint upon the proceedings of a State Court and jurisdiction is not conferred by vigorous allegations touching the injustice or invalidity of the objectionable proceedings. (Authorities.)

"In the latter case, this Court had occasion to consider and construe this statute and the cases cited above, and touching them, said:

" 'The principle is that, in order to preserve the dignity and protect the effectiveness of the process of Courts of concurrent jurisdiction, and to avoid unseemly conflicts between them, and between their respective executive officers, no remedy of an injunctive or dispossessory character will be afforded by one Court against the acts of the executive officers of the other Court, when done under color of an order or process issuing from such other Court, because it would have the inconvenient and anomalous effect to stay the proceedings in one Court to allow another Court to investigate the validity of the acts done under such proceedings.' "

In **Phelps v. Mutual Reserve Association, 112 Fed. Rep., 455,** Mr. Justice Lurton in dealing with the question under consideration said:

> "No case has been called to our attention which sanctions the contention of counsel **that the mere fact that the jurisdiction of the State Court is challenged will justify the enjoining of one Court by another.** The State and Federal Courts are independent of each other, except in a limited class of cases, when a writ of error will lie from the highest Court of a State to the Supreme Court

of the United States. They are Courts of equal dignity and of concurrent jurisdiction in respect to the subject matter of this controversy. **Neither Court has the power to control or coerce the other.** If the Circuit Court of the United States has the power and jurisdiction, when diversity of citizenship exists, to enjoin and dispossess a receiver, acting under authority of the Jefferson Circuit Court, **upon a bill averring a defect of jurisdiction,** the other must have an equal right upon a case presenting similar jurisdictional questions. The power must be reciprocal, if it exists. We entirely approve the view expressed by District Judge Love in **Senior v. Pierce (C. C.) 31 Fed., 625, 631** in saying that:

" 'Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the application of the principle whether the question to be decided by the two Courts **is one of jurisdiction** or of mere property right, the jurisdiction being conceded. The State Court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the State Court. If the Federal Court may decide the question of the regularity of the seizure **and jurisdiction** adversely to the State Court, and proceed to take the property from its custody by force, why may not the State Court reciprocally, in any parallel case, decide the same questions when the property is in our custody and proceed by a writ of replevin to dispossess the marshal? But, assuredly, if the Federal Court were in possession by legal process, it **would not permit** the State Court to decide the **question of jurisdiction** and wrest the

property from our control. **The only safe and legitimate course for the suitor is to pursue his remedy by some proper ancillary proceeding in the Court first obtaining jurisdiction, and take his appeal, if not satisfied, to the final justice of the Supreme Court of the State, or of the United States, as the case may require.** It will not do for the suitor to assume that he cannot obtain justice in one jurisdiction or the other. But at all events it is infinitely better that injustice should be done and suffered in particular cases than that a course of proceeding should be sustained fraught with all the evils of conflicting judgments and forcible collisions between the two independent jurisdictions.' "

And in concluding his opinion in this case Mr. Justice Lurton said:

> "Inasmuch as **no relief** whatever can be obtained unless the proceedings in the State Court **can be enjoined,** the cause will be remanded with direction to dismiss the bill for want of equity and to dissolve the injunction."

This Court in affirming the judgment in the case last cited, said:

> "But it has been sanctioned by the judgment of the Court in which the proceeding was had **and cannot be treated by the Federal Courts as unauthorized** (authorities.) **If not warranted by the law of the State, relief must be sought by review in the appellate Court of the State, and not by collateral attack in the Federal Court."**
>
> **190 U. S., 159-160.**

See, also, the following authorities:

Oliver v. Parlin, 105 Fed., 272, (5th Cir.)
M. K & S. R. Co. v. Scott, 13 Fed., 793 (5th Cir.)
Trust Co. v. Bentz, 59 Fed., 645 (5th Cir.)
Union Pac. Co. v. Flynn, 180 Fed., 565, (5th Cir.)
Mass. Assn. v. Lohmuller, 74 Fed., 23.
Couer D'Alene & Co. v. Spalding, 93 Fed. 280.
Ins. Co. v. Schmidt, 175 Fed., 720.

In **Ex Parte Simon,** this Court studiously refrained from passing upon the jurisdictional power of the Circuit Court to issue an injunction staying proceedings in the State Court. The case as presented by the bill charging fraud and ill practice, (and which charges—now that the case has been tried—are shown to have been wholly without warrant or justification) would have been in an appropriate proceeding based on diversity of citizenship, sufficient to have maintained jurisdiction to recover from the beneficiary the fruits of his fraudulent conduct if that had been properly charged and established —but the case as presented did not warrant or justify under the law the issuance of an injunction by the Federal Court to stay proceedings in the State Court.

The learned judges of the lower Conrt failed to appreciate the full force and effect of the **specific** terms of Section 270.

They dealt with the case at bar as though the language of the statute provided that "the writ of injunction shall not be granted by a Court of the United States to stay proceedings of any nature, in any Court of a

State, **except the rendition of judgments therein.**" If the statute had so provided, it would, we submit, have contained some express limitation or restraint upon the language of the **exception**, so as to leave open to inquiry, in the Federal Court, the question as to whether the State Court **had jurisdiction** to render the judgment complained of, or as to whether it was **void** for want of jurisdiction, or was merely **voidable.**

But Congress did not intend to invest the Federal judiciary with the power and authority to investigate and determine the **jurisdiction** of the State Courts in the rendition of judgments, but stayed its hands against interference or **attempted control of proceedings** in the State Court.

The words of the statute "staying proceedings" were used advisedly and cautiously. The broadness of the terms includes **all proceedings** in a State Court, from the filing of the declaration or petition until the final result has been reached.

Riggs v. County, 6 Wall, 166.
Bank v. Stevens, 169 U. S., 464.

Let the distinction be kept clearly in mind between "**staying proceedings**" in a State Court by the process of injunction in a Federal Court, and the **inquiry**, in a proper case, **into the validity of a State Court judgment**, when sued on or set up in a Federal Court, where it is collaterally attacked, as a **void proceeding**, for want of jurisdiction of the State Court to render it, or the case where a bill is filed to **cancel the record** of such a judg-

ment, **as a cloud** upon the title to realty, or the case where it is sought, in an appropriate bill filed in a Federal Court, to compel the defendant **to account for** and to **disgorge** the fruits realized from the **execution** of a fraudulently obtained judgment.

The principle involved in this matter is of transcendent importance. The integrity of our judicial system is at stake. Thus far in our dual governmental system there has been a remarkable freedom from direct conflict between the Federal and State judicial tribunals. That gratifying condition is due, in large measure, to the wisdom of the founders of our government, who, in its earliest days foresaw the dangers which would flow from attempts on the part of the Federal Courts to enjoin proceedings in State Courts and forbade such interference by act of Congress; the principle of this legislation was applied by the Supreme Court at an early period to nullify the attempts of the State Courts to enjoin proceedings in the Federal tribunals.

It comes, therefore, with something of a shock to find that a Federal Court has granted an injunction restraining proceedings in a State Court, where the suit is brought for no other purpose than to secure such injunction where the bill of complaint contains **no other prayer for relief** than that of the restraint of the proceedings in the State Court, and where the record does not even disclose the slightest reason for the granting of such extraordinary relief and negatives the possibility that it is sought to preserve and safeguard the priority or exclusiveness of jurisdiction of the Federal Court.

II.

Because of their close association and dependency we shall consider and discuss under general headings the 6th, 8th, 9th, 11th, 12th, 13th, 14th and 16th assignments of error.

A BILL SEEKING THE RELIEF HERE PRAYED FOR IS BY ITS NATURE AND CHARACTER NECESSARILY AN ANCILLARY BILL.

A bill of **this nature**, seeking such relief as is here prayed for, as between the **same parties in a suit at law**, brought in any Court of America, whether **State or Federal**, must of necessity be or partake of the nature of an **ancillary or dependent bill**, and not, as is the bill in this case, **an original independent injunction bill**. It must where the sole relief is by injunction, be brought **in the same Court** which rendered the judgment complained of, when such Court is competent to grant relief, or at least within the **same jurisdiction**. Such has been the settled doctrine of this Court for almost a century.

Dunn vs. Clark, 8 Peters, 1.
Freeman vs. Howe, 24 How. 450.
Randall vs. Howard, 2 Black, 585.
Minnesota Co. vs. St. Paul Co., 2 Wall. 609-633.
Railroad Co. vs. Chamberlayne, 6 Wall. 748.
Christmas vs. Russell, 14 Wall. 81.
Davis vs. Gray, 16 Wall. 219.

Bank vs. Turnbull, 16 Wall. 195.
Railroad Co. vs. Railroad Co., 111 U. S. 505
Krippendorf vs. Hyde, 110 U. S. 276.
Dewey vs. Coal Co., 123 U. S. 333.
Johnson vs. Christian, 125 U. S. 642-646.
In re. Tyler, 149 U. S. 181.
Root vs. Woolworth, 150 U. S. 401-413.
White vs. Ewing, 159 U. S. 39.
Carey vs. Houston & T. C. R. R. Co. 161 U S. 115.
Julian vs. Trust Co., 193 U. S. 113; Bate Fed. Eq. Proced., Vol. 1, Sec. 97 (Note) quoted and adopted in Julian vs. Trus Co.
Goodrich vs. Hunton, 29 La. An. 372.
Dunlap vs. Stetson (Story, J.) **4 Mason, C C. 349; S. C. Fed. Cas., No. 4164.**

It cannot be possible that the authorities cited are o less weight than the dicta in **Marshall v. Holmes, 141 U S., 589,** to the effect that a bill to enjoin a judgment of State Court, brought in a Federal Court, is properly cog nizable in the Federal Court **as an original and independ ent bill,** where the parties to the bill are the **same partie as the parties in the suit at law in the State Court,** wher the State Court has all of the power and processes to ren der full relief, and that such a bill is **within the jurisdic tion of the Federal Court** if there be the requisite diver sity of citizenship. Such a view is not only **irreconcilable** with the mass of authorities cited, **both in terms and on principle,** but are in conflict with the **positive doctrinal views** of Mr Justice Story, as expressed in his classic work on the **Constitution, Vol III, Sections 1751, 1753,**

and in his **Equity Jurisprudence, Section 900**, where he lays down— as a **fundamental exception** to the general **chancery** doctrine—the principle that neither a State Court will thus interfere with a Federal Court, nor a Federal Court with a State Court, a principle which he says:

> "proceeds upon **peculiar grounds of municipal and constitutional law**, the respective Courts being **entirely competent** to administer full relief in the suits pending therein."
>
> See also, Chancellor Walworth in **Meade v. Meritt, 2 Paige, 404, 405.**
>
> **Bicknell v. Field, 8 Paige, 440, 444.**
>
> Chancellor Pitney in **Bigelow vs. Smelting Company, 74 N. J. Eq., 457, S. C. 71 Atl. Rep., 153.**

COMPLETE AND ADEQUATE REMEDY IN THE STATE COURT.

Aside from the foregoing discussion, it is apparent, as matter of law, upon the face of the bill, that the complainant herein, upon making proper showing, had a plain, adequate and complete remedy in the State Court, both at law and in equity.

> See **Ewing v. City of St. Louis, 5 Wall., 413.**
> **Nougue v. Clapp, 101 U. S., 551.**

First: By filing a motion for new trial, in the State Court, at any time between January 16th and January 20th, 1905, (see deposition of Hall, complainant's attorney, Rec., p 65), setting out all of its grounds, or sim-

ply the ground of want of citation, and thereby suspending and holding in abeyance the final signature of the Judge to the judgment, until it could set up its other grounds for a new trial, if necessary. (Louisiana Code of Practice, Arts. 558-559.) And if there were shown on the face of the motion, sufficient grounds for a new trial, the trial Judge of the State Court, under the letter of the law, must have granted the same. Judge Sommerville's affidavit, Rec., p. 26, and Mr. Hall's unsworn deposition, Rec. p. 67, make plain and evident the fact that this simple, certain and direct method of relief in this case, was deliberately ignored, by counsel for the Southern Railway Company. (Rec. p. 196.) And the circuitous, complex and antinomian procedure that it adopted—in lieu of the direct and simple remedy of new trial in the State Court, of filing a bill in chancery in the Federal Court, and seeking to stay proceedings in the State Court—was merely in keeping with, and a part of its settled and studied plan of defying the statute laws of a Sovereign Commonwealth and holding its Courts, as well as its statutes and laws, in contempt.

Second: By the remedy of suspensive appeal from the final judgment of the Civil District Court, to the Supreme Court of Louisiana, either with or without a prior motion for new trial, upon making, within ten days after the judgment was signed, its motion of appeal in open Court and tendering its appeal bond. And, upon assigning error patent on the face of the record—towit, want of citation, as shown on the face of the sheriff's return, complainant could have thereupon required the Supreme Court of Louisiana to determine whether, on the face of

the record, the judgment of the Civil District Court was a valid judgment, rendered upon proper and lawful citation, under the laws of the State. And, upon setting up, in its assignment of errors, the provisions of the Fourteenth Amendment to the Constitution of the United States, complainant could have laid the foundation for a writ of error, under **Section 709, U. S. Rev. Stat.**, and could have thereby had the judgment of the Supreme Court of the United States upon its case, if denied relief upon a final judgment therein by the Supreme Court of Louisiana.

Third: Under **Article 606 of the Louisiana Code of Practice**, complainant might have had full relief by showing in an action of nullity, coupled with a prayer for injunction, that the judgment was null in point of form, for alleged defective or insufficient citation, or for no citation at all, if that were the fact. And, upon setting up in the petition for nullity, the Fourteenth Amendment to the Federal Constitution, it could have brought the case to the Supreme Court of the United States, upon writ of error to the Supreme Court of Louisiana, pursuant to the terms of **Section 709, U. S. Rev. Stat.**, in the event the State tribunal of last resort denied the force and effect or the application of the constitutional provision invoked in a final judgment, refusing complainant relief.

Fourth: Under **Article 607 of the Louisiana Code of Practice**, complainant might have brought its equitable action of nullity in the State Court, coupling therewith an injunction, by showing that the judgment of the State Court was null for "fraud or other ill practices" or had been obtained upon false or "forged documents." And,

upon setting up a federal question, right or immunity in its petition for nullity, might have had full relief, if entitled thereto, from the Supreme Court of the United States, if cast in the State Court of last resort, upon suing out a writ of error to the final judgment of the Supreme Court of Louisiana, under **Section 709, U. S. Rev. Stat.**

THE COURTS OF THE STATE PROCEED ON THE SAME THEORY AS COURTS OF THE UNITED STATES.

In the event of complainant electing to found its relief in its action of nullity in the State Court, upon the provisions of **Article 607 of the Louisiana Code of Practice**, relief could have been afforded in the same measure and upon substantially the same ground, by the State Courts, that a Court of the United States would have been able to afford upon a bill in chancery, seeking relief from a judgment of the Federal Court, upon a bill **properly framed and verified.** The equitable grounds upon which the Courts of Louisiana will afford relief in an action of nullity, under **Article 607 of the Louisiana Code of Practice** are **at least as broad** as the grounds upon which the Courts of Equity in England and in other States and of the United States will afford relief in cases where they have jurisdiction.

Chinn v. Municipality, 1 Rob., 523.
Paxton v. Cobb, 2 La., 139.
Norris v. Fristoe, 3 An., 146.
Blank v. Speckman, 23 An., 146.

Gayarre v. Millaudon, 23 An., 305.
Perry v. Rue, 31 An., 287.
Bryant v. Austin, 36 An., 808.

It is also settled, by authority, and beyond dispute, that the equitable action of nullity proceeds just as the legal action of nullity for **want of form (C. P. Art. 606) in** the Court of Louisiana, upon th **identical principle** that a Court of the United States, on the equity side, would proceed in entertaining a bill to annul or enjoin a judgment for fraud, accident or mistake, rendered by a Federal Court. In either case, the bill would be **an ancillary bill,** and would be brought in the **same Court** which rendered the judgment complained of, and **not** an original and independent injunction bill as here. See **Goodrich v. Hunton, 29 La. An., 372,** citing and basing its reasoning upon **Freeman v. Howe, 24 How., 460; Dunn v. Clark, 8 Peters, 1; Bank v. Turnbull, 16 Wall., 195.** See also **Barrow v. Hunton, 99 U. S., 80.**

But complainant, stubbornly determined not to submit itself to the jurisdiction of the State Courts of Louisiana, **even as a threshold through which to reach the Supreme Court of the United States,** fearing that there would be sooner or later, a day of settlement with Simon in the Louisiana Courts. So, in order to **destroy** and totally **blot out** Simon's cause of action, and to wipe out **its own admitted legal liability to him or his heirs,** it has sought, and has, so far, successfully applied, the well-known Russian method of **BLACKING OUT** the record of a judgment of a Court of the State by the so-called equitable writ of injunction in this case, issuing from a Court of the United States, a

Court of concurrent jurisdiction with the State Court that rendered the judgment complained of, thus overriding, in its disregard of all law, not only the Courts and the laws of the State, but the Act of Congress of 1793, which was enacted expressly to insure the independence of the State Courts.

In **Nougue vs. Clapp, 101 U. S., 551, 554,** which was an original independent injunction bill, filed in the United States Circuit Court for the District of Louisiana, to impeach a decree and order of sale thereunder, rendered by a State Court of Louisiana, for alleged extrinsic and collateral fraud, and where a prior injunction had been prayed for in the proceedings in the State Court, but had not been issued by the Clerk, through alleged collusion with the defendants to the bill, and where relief was refused by this Court, on the ground that complainant had ample remedy, both by appeal and by action of nullity in the State Court on complainant's own showing, Mr. Justice Miller speaking for the unanimous Court, page 554, said that to entertain this bill as an original bill, and to grant the relief prayed for,

> "would be an **invasion of the powers belonging to that Court** (the State Court) and such a doctrine would, upon the simple allegation of fraud, practiced in the Court, enable a party to retry in a Federal Court **any case decided against him in a State Court.**"

No precedent can be found in the jurisprudence of this Court for entertaining an original and independent injunction bill, where the sole relief sought is an injunction to stay proceedings in a State Court.

ARGUMENT UPON THE MERITS OF THE BILL.

Little remains to be said on the merits of the bill, because the facts which stand out in the record, upon complainant's own evidence, offered in support of the bill, make it plain that the case of complainant is wholly devoid of merit upon the facts. In the first place, the evidential value of the bill is very weak, since the bill is not properly verified in respect to some of its most vital averments, for example:

The averment in paragraph 9 (Rec. p. 5): "Your orator avers that it has never received from the Secretary of State the above referred to citation, issued out of said suit, No. 74,869 of the Civil District Court for the Parish of Orleans, nor was it advised nor had it any knowledge of the pendency of said proceeding, until after the rendition of said judgment," is sought to be sustained by the jurat of A. B. Andrews, First Vice-President of the Southern Railway Company, of date January 31st, 1905, at Washington, D. C., (the bill being filed February 6th, 1905, Rec. p. 1), as follows, to-wit:

> "That he, affiant, has read the foregoing bill of complaint, and that the same is true to his knowledge, in so far as the citizenship and conduct of business of complainant is stated, and that in so far as the **OTHER MATTERS** alleged, he has no personal knowledge as to same, beyond the official records and official statements made to him, but that they are true to the best of his information and belief." (Rec. p. 7.)

This jurat might as well have been made, according to its terms, or for aught that appears in the record, by **any person**, outside the Southern Railway officials, who happened to know that the Southern Railway was a Virginia corporation operating a line of railroad not running continuously and directly into the State of Louisiana, and who was **specially selected** for the reason that he had no knowledge or information of the facts of the case, other than the citizenship of complainant, and the doing of business by the operation of a railway line in to the State of Louisiana, since the jurat neither **states** nor **implies** that the first vice-president is the **PROPER OFFICER** of the corporation **to know** of such **OTHER MATTERS**, as are set up in the bill; nor does it show that the affiant is **authorized** by the charter or by-laws of the corporation, to make such jurat **in the absence** of the president or of such other **proper officer**; nor does the jurat state **who is such proper officer to know** of the **OTHER MATTERS** set up in the bill; nor does it state that such **PROPER OFFICER** has shown **his official records** to affiant, nor that affiant has had **any information whatever** from the **PROPER OFFICER** of the corporation, who is **charged with the duty of knowing** or who should know of such **OTHER MATTERS**; nor that affiant had **ever inquired** as to what the facts were as to notice of service, or as to notice of the issuance of citation or notice of the suit or the pendency thereof from the **PROPER OFFICER** of the Southern Railway Company, or from the **PROPER OFFICIAL RECORDS** of said company. It is entirely possible for aught that appears that **one** or **more** of the general officers of the corporation, **outside of Andrews**,

and that the **PROPER OFFICER**, had notice of the issuance and notice of the service of the citation, and notice of the suit in the case by being advised of the **FACT** of service of citation upon the Secretary of State, without Mr. Andrews being advised of the fact, and that the **proper official records** might show such facts, without Mr. Andrews having seen or had access thereto.

Complainant having alleged, as a bare **equitable ground** of relief no notice of the suit and no notice of citation and no notice of the service of citation upon the Secretary of State, without alleging a single fraudulent act on the part of Simon in reference thereto, **was surely called upon** to produce **at least prima facie sworn evidence thereof** on the face of its bill. This jurat, we submit, is **on its face**, merely perfunctory and **pro forma**, and was **stale** when the bill was filed. We make this, perhaps **hypercritical**, analysis of a mere jurat, merely to **emphasize the character of the "proof"** that was actually offered by complainant in support of the bill at the hearing of the motion for a preliminary injunction, and before the master, whose report **with the evidence and the exhibits thereto, furnished all of the evidence offered on the final hearing.** There is not a line nor a scintila of direct evidence contained in this record, in any jurat, affidavit or deposition offered by complainant, tending to show that the **proper officer** or **agent** of the Southern Railway Company had **no notice of Simon's suit**, or no notice of the issuance or of service of citation, before the entry of default or before the rendition of the verdict and the entry of judgment thereon in the State Court.

W. W. Finley, who was, at the time of the suit, the second vice-president, (Rec. p. 202), and who at the time of his deposition, was the president of the complainant, says not a word about the receipt or non-receipt of notice of the suit or of notice of citation or of service thereof or of the pendency of the suit in his deposition or in his affidavit, although he testifies that **HE WAS THE PROPER OFFICER** at the time of suit to direct the taking of steps in controlling, defending or settling litigation in which the company was involved. (Rec. p. 202.)

There is not a line nor a word in the record denying or negativing knowledge or notice of suit or of the notice of citation or of the notice of service thereof in the deposition of J. C. Andrews, the passenger agent at New Orleans, or of Graham, the freight agent at New Orleans, or of Shumate, the law agent, as he terms himself, nor of Kennedy, the assistant chief law agent, all of whom filed affidavits and depositions in the case. The only other officer, agent or attorney of the company, who makes any reference direct, or indirect in his so-called affidavit or deposition, to notice of suit, or to notice of the issuance or service of citation, in Simon's case, is Mr. Harry H. Hall, the counsel for the complainant in this case, who drew the bill, "**from statements made to him by Colonel Henderson, the assistant general counsel at Washington, D. C.**" (Rec. p. 66.) It is plain from Mr. Hall's unsworn statement, (Rec. pp. 65-67), and from Judge Sommerville's affidavit, (Rec. pp. 25, 26), that he, Mr. Hall, with full knowledge of the verdict and tentative judgment thereon, took no action in the State Court, although there was ample time to do so, be-

tween the entry of the verdict and the signature of the judgment, to move for a new trial, if based on no other ground than the **legal reason, as stated by Mr. Hall,** that the judgment in his opinion, was void for want of citation. (Rec. p. 196.)

There is neither deposition nor affidavit **in any form,** in this record, **from the Secretary of State** or the **Assistant Secretary of State,** that the complainant was not duly **advised** of the service of process, and the only **SCRAP** of so-called evidence offered by complainant, at any stage in the case, from the filing of the bill, to the final hearing, seeking to show that there was no notice of the **fact** of service thereof on the Secretary of State, is an **unsworn** and **unexplained** letter from the Assistant Secretary of State, addressed to "**Harry H. Hall, Esq., P. O. Box No. 444, New Orleans, Louisiana.**" (Rec., pp. 18-19.)

The Assistant Secretary of State appears to state in this letter to Mr. Hall, the following:

> "Acting under the instructions of the Attorney General, we simply filed the copy of citation and petition made on us in the case of **Ephraim Simon v. Southern Railroad Company, No. 74,869, Civil District Court Parish of Orleans, the said company having failed to designate an agent upon whom service of process can be made, as required by law.**"

The letter does not state, nor imply, that the Secretary of State or the Assistant Secretary of State **failed to** notify the president or other **proper officer** of the Southern Railway Company of the **fact** that a citation

and petition **had been served** on the Secretary of State and **was on file in his office.** The foregoing comprises the **whole record** made by complainant in its effort to show that it had received no notice of the suit and no notice of the issuance of citation and no notice of the service of citation upon the Secretary of State in Simon's suit.

Here the **record closes** in relation to direct evidence of notice to the corporation of the service of citation and of the pendency of the suit.

We respectfully submit,

First, that the evidence submitted does not justify the assumption that **no notice** was **in fact** given to the Southern Railway Company, of the issuance or of service of citation upon the Secretary of State.

Second, that the **burden of proof** rested on the Southern Railway Company, to establish, **as a fact** the **unsworn averment,** in its bill of complaint, to the effect that the Southern Railway Company **had no notice** from the Secretary of State, **or from any other source,** of the issuance or the service of citation in Simon's suit, on the Secretary of State, and there should have been additionally to the charge preferred a distinct affirmative allegation, **followed by proof** of some fraudulent act of Simon in defeating and preventing this notice. It was bound to make this showing in order to have any appearance of equity in its bill. Where a cause of action **depends** upon a **negative state of facts,** which is alleged and set up as a **substantive part of the case,** as a ground of relief, it is the undoubted law that **prima facie** the establishment of such

negative state of fact rests upon the party so alleging and relying upon such negative.

If it was the **fact** that the **proper officer** of the Southern Railway **had no notice** of the issuance and **no notice of the fact** of service of the citation in Simon's case, upon the Secretary of State, or of the pendency of the suit, why did W. W. Finley, the second vice-president, who appears to have been such **proper officer at the time of the suit,** (Rec. p. 202) say **not a word,** direct, or indirect, on the subject, either in his affidavit, (Rec. pp. 67,68), or in his **carefully prepared** deposition? (Rec. pp. 198-207). Why was there not a line of testimony or statement on the subject from any other officer, agent, servant or attorney, **except Mr. Hall,** who admittedly had notice on the day the verdict was rendered, and who had **ample opportunity** to move for a new trial or to take other proceedings as he might have thought necessary to protect his friends and clients. (Rec. pp. 65-196.) Why was there no affidavit or deposition from the Secretary of State or the Assistant Secretary of State that the Southern Railway Company were not informed or advised of the service of process? Accordingly, we submit that the **introductory and narrative statement** in the opinion of District Judge Foster, to the effect that "the evidence in this case shows, and it is not disputed, (sic) that the complainant had no **actual notice** of the pendency of the action in the State Court, until **after the final judgment**" is not only not justified or sustained by anything in the record, but is at variance with the statement of Hall, (Rec. p 65) the only witness who spoke on the subject. This statement of the District

Judge was clearly the result of misapprehension of the **exact purport and effect** of the evidence.

We submit that the Southern Railway Company utterly failed to establish the essential, if not the controlling averment of its bill, **"want of knowledge of the pendency of said proceedings."** (Rec. p. 5.) Proof which it was called upon to make, and proof of which fact it was its duty to make.

THE SECRETARY OF STATE THE COMPLAINANT'S AGENT.

The fact that the complainant, doing business in the State of Louisiana did not select a particularly designated agent upon whom process could be served (Act 54 of 1904; Sec. 8 of Act 74 of 1902) leads to the inference that it was presumably contented with the State's designation of the Secretary of State to act as the duly accredited representative of the corporation on whom, when directed against it, legal process could be served.

It was a duty personal to the corporation itself, for its own protection, to advise its **statutory** agent of the disposition to make of process directed against it, and in absence of directions the fault would be chargeable to the complainants' negligence and even were it true (?) in this case that the agent either from want of direction from his principal or from negligence failed in his duty to give notice, his failure or negligence could not

affect the validity of the service of process or the rights of defendant.

This principle was enforced by this Court against a political subdivision of the State in **Knox v. Harshman, 133 U. S., 152,** where Mr. Justice Gray, speaking for the Court, said:

> "Any negligence of the Clerk in communicating the fact to the County Court **was negligence of an agent of the county, and did not affect the validity of the service of the judgment.**"

And in the case of the **State v. County, 51 S. E., 865,** the Supreme Court of West Virginia said:

> "The auditor does nothing but accept service—a mere ministerial act. He does not confess judgment nor does he do any discretionary act. Doubtless, if he fail to warn his corporation of the suit, he would be liable on his bond, just as to any person for failure to perform a legal duty."
> **51 S. E., 865.**

PROOF AS TO DOING BUSINESS.

On the other question of fact set up in the bill as a ground for relief, to-wit, that the complainant was **not doing business** in the Parish of Orleans, in the State of Louisiana, we submit that the proof in this record is simply **overwhelming** against the complainant. On this point of complainant's proof we have the **finding of the**

jury in the State Court (which finding is under the VII Amendment to the Constitution conclusive on every Court of the United States. See in this connection **C. B. & Q. Railroad v. Chicago, 166 U. S., p. 242)** and the judgment of the Civil District Court thereon, as well as the implied finding of Judge Foster, the District Judge, who held that the statute under which the service was made, was **unconstitutional** and who must therefore have found, **as a necessary conclusion of fact,** that the Southern Railway Company **was doing business** within the City of New Orleans, and the State of Louisiana, at the time of Simon's suit, otherwise the Statute could not have been the subject of the Court's consideration, as it was invoked as the **sole ground of jurisdiction** of Simon's suit in the State Court. and the basis for process.

Besides this, we have the distinct, clear and unequivocal finding on this point of fact by the Circuit Court of Appeals of the Fifth Circuit. In its opinion it announced its conclusion on this point in the following words:

> "2nd. At the time the petition was filed in the State Court by the appellant to recover damages of the appellee, to-wit, Dec. 1st, 1904, **the latter was dong business in the Parish of Orleans, State of Louisiana.**" (Rec. p. 310.)

We submit, therefore, that where a **question of fact, tried** by and involved in the **verdict of the jury** is upheld, by the approval and the finding of **three successive Courts,** one State Court and two Federal Courts, that

such **question of fact** must be held **to be conclusively** established.

THE EVIDENCE IN SUPPORT OF THE FRAUD ALLEGATIONS.

All that remains of the bill, **as matters of fact**, are the so-called "fraud allegations." It is only necessary to say that there is not a line, not a word of evidence in the record, tending to support **any one** of the so-called "fraud allegations." The master **found** and expressed in a somewhat involved and diffuse form, the following **definite conclusions.** We shall state, in a more logical order than the master has done, his **conclusions of fact as to the fraud allegations.**

First: The proceedings as shown by the record of Simon's suit in the State Court, assuming that the mode of service was valid "are regular and strictly according to the laws of practice governing the Louisiana Courts." (Rec. p. 173.)

Second: There was no **undue haste,** and **more than the usual delays** were permitted to intervene before the preliminary default was entered and before the judgment by default was confirmed. (Rec. p. 173.)

Third: There was **no false swearing** or false testimony adduced in the trial before the jury or before the Court. (Rec. p. 173.)

Fourth: The judgment of the State Court is "entitled to the presumption that it was **rendered on sufficient evidence.**" (Rec. p. 173.)

Fifth: The evidence does not justify a conclusion that the judgment was rendered by any "**fraud or other ill-practices.**" (Rec. pp. 170-171.)

These findings and conclusions of fact made after a patient hearing of the parties, although excepted to by **complainant** solely on the adverse finding on the fraud charges, (Rec. p. 277) were never set aside by the trial Court nor questioned in any other way. Nor were these findings set aside, denied or disputed by the Circuit Court of Appeals.

In the disposition of the case, the trial Court held that Act 54 of 1914 providing for service of process through the Secretary of State on foreign corporations doing business in Louisiana, was violative of the 14th Amendment to the Constitution of the United States.

No such contention was advanced by the complainant, nor was the **validity** of the act attacked in the bill. **(Southern Railway v. King, 217 U. S., 534; Hanford v. Davis, 163 U. S., 279; Cooley's Constitutional Limitation, 2nd Ed., 252.)** Its application was alone denied by complainant on the sole ground that it was a foreign corporation **NOT** doing business in Louisiana.

The Circuit Court of Appeals in its disposition of the case affirming the judgment below, held: that the mode for service as shown on the face of the sheriff's return was **not valid** under the State law.

The bill on the fraud charges under the proof administered was totally without foundation in fact.

We have, accordingly, the case of a suit in equity to stay proceeding at law without a single equitable ground to sustain it, and decided upon legal points not raised or presented by the pleadings in the cause.

It is submitted that upon the failure of the complainant to establish by sufficient proof the basic matters of fact set up as equitable grounds for relief, it was the plain duty of the Court to deny the relief sought and dismiss the bill.

CONCLUSION.

It is wholly unnecessary to formally discuss here the point raised by the Circuit Court below, as the sole ground of its decision, or the point raised by the Circuit Court of Appeals of the Fifth Circuit, as the sole ground of the decision of that Court, for the reason that each of these grounds, as hereinabove pointed out, is manifestly **ultra petitionem,** and being purely legal moot questions, they are not involved in this cause. No Court in Louisiana has ever decided that Act No. 54 of 1904, of the Legislature of that State with reference to **foreign corporations doing business and having property in the State,** is unconstitutional either under the Federal or State Constitution. No Court in Louisiana has ever held or decided

that a service of citation, made on the **Assistant Secretary of State in the absence of the Secretary of State**, is not a valid service under the State Law involved in this case, or under the Fourteenth Amendment of the Federal Constitution, and no decision of the Supreme Court of the United States has ever so held, in dealing with the Louisiana Statute or any similar State statute, and even if the law under which judgment was obtained was unconstitutional or the service of process invalid, the sole remedy to reverse the judgment of the State Court is through a writ of error from this Court to the highest Court of the State under Sec. 709 of the United States Revised Statutes.

Answering the point on which the Circuit Court of Appeals pitched its opinion and decree we say that under the Louisiana Constitution of 1898, Article 79, and under the letter of the Louisiana Statutes, Revised Statutes 1870, Secs. 3522, 3523, and under the jurisprudence of that State, (see **State v. Clark, 46 An., 1409**) the Assistant Secretary of State is, in the absence of the Secretary of State, **pro hac vice** the Secretary of State. The State Statute of Louisiana (Act 54 of 1904) pursuant to which jurisdiction was acquired by the State Court, in Simon's case, is modeled on, and was patterned after, the Pennyslvania Statute, which was upheld by this Court in **Ex Parte Schollenberger, 96 U. S., 369**, and is supported by the line of decisions of this high tribunal, that have repeatedly affirmed and re-affirmed that case, and the Statute in question is nearly identical in terms with many other State Statutes on the same subject matter that have been expressly upheld as due process of law

under both State and Federal Constitutions, by State as well as by Federal Courts.

See, also:

Railroad Company v. Harris, 12 Wall, 65.
Railroad Company v. Whitton, 13 Wall, 270.
Pennoyer v. Neff, 95 U. S., 714.
New York, etc, Railway Company v. Estill, 147 U. S., 608.
Barrow Steamship Company v. Kane, 170 U. S., 109.
Connecticut Mutual Life Insurance Company v. Spratley, 172 U. S., 602.
Mutual Reserve Association v. Phelps, 190 U. S., 147.
Pringle v. Woolworth, 90 N. Y., 509.
Foster v. Traders Mutual Life Insurance Company, 48 S. E. Rep., (N. C) 667.
State v. St. Mary's Petroleum Company, 51 S. E. Rep., (W. Va.) 865, affirmed in 203 U. S., 183.
Wilson v. Seligman, 144 U. S., 45.
Ehrmann v. Teutonia Insurance Company, 1 Fed. Rep., 475.
Knapp Company v. Insurance Company, 30 Fed., 607.
Diamond Glass Company v. Minneapolis Company, 55 Fed., 27.
Berry v. Company, 46 Fed., 439.
Merchants v. Railway, 13 Fed., 358.
Palmer v. Chicago, 70 Fed., 886.

Stewart v. Harman, 98 Fed., 190.
Miller v. Council, 63 N. W Rep., 565.
Youmans v. Co., 67 Fed., 282.
Wilson v. Co., 20 N. E., 318.
Sparks v. Ass'n., 69 N. W., 678.
Hinkley v. River Co., 72 N. W., 835.
Keystone vs. Court, 72 Pac., 398.
Farrell v. Gold Mine, 49 Pac., 876.
Commonwealth v. Parlin, 80 S. W., 791.

And finally it is confidently submitted that neither could the United States Circuit Court have decided the moot question of Federal law on which it professed to base its decision in this case, nor could the United States Circuit Court of Appeals have decided the equally moot question of State law upon which it based its decision in this proceeding without inferentially assuming the power to sit as a Court of Errors or Appeals over the State Court, which had assumed jurisdiction and decided in this case these identical questions the other way.

The moot questions decided by these two Federal Courts therefore raise a wholly uncalled for conflict of authority between Courts of concurrent jurisdiction, to-wit: a conflict of authority between the Civil District Court, **in asserting jurisdiction** to try the case of **Simon v. The Southern Railway Company**, and the United States Circuit Court for the Eastern District of Louisiana, asserting that the Civil District Court for the Parish of Orleans, **was without jurisdiction** to try the case of **Simon v. The Southern Railway Company**, all of which is inimical to the whole theory of the independence as well as to the

harmony of the two separate systems of State and Federal judicature, a condition of affairs which is expressly condemned by the high authorities hereinabove cited and quoted.

In the case at bar the sole relief sought and prayed for is the "granting" of a "writ of injunction by a **Court of the United States** to stay proceedings in a **Court of a State**," without any **pretense** that this case is **within the exception** of the Statute as to bankruptcy, without any **pretense** of any **prior or exclusive jurisdiction** or **jurisdiction by removal** of the cause, or under any Federal Statute; without any **showing** of right to such relief, as a matter of equity and without any **pretense** that the State Court could not in an ancillary proceeding grant all the relief both at law or in equity, that any Federal Court could possibly grant in an original and independent proceeding, where its jurisdiction was undoubted, and its powers not fettered by a prohibitory statute as it is in this case. To the sole relief sought, we have invoked as a conclusive bar to the jurisdiction of the Federal Court, the inhibitory terms of Section 5 of the Judiciary Act of 1793, (now Section 720 United States Revised Statutes., and Section 265, of the Judicial Code) with the long line of decisions thereon, pronounced by this high tribunal, from **Diggs v. Walcott, 4 Cranch, 179**, to **Hull v. Burr**, just decided—a statute which this high tribunal has said, in its very last decision on the subject "has been constantly observed by the Courts."

It is therefore, most respectfully and deferentially urged and submitted, that the decree of the Circuit Court of Appeals for the Fifth Circuit, affirming the decree of

the United States Circuit Court for the Eastern District of Louisiana, is manifestly erroneous and should therefore be reversed, and the cause remanded to the United States District Court for the Eastern District of Louisiana, with directions to dismiss the bill of complaint herein, with costs.

Respectfully submitted,

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September 20, 1914.

APPENDIX.

EXTRACTS FROM THE CONSTITUTION OF LOUISIANA OF 1898.

Article 264:

No domestic or foreign corporation shall **do any business** in this State, without having one or more known places of business, and an authorized agent or agents in the State upon whom process may be served.

Article 79:

The Treasurer, Auditor, Attorney General and Secretary of State shall be elected by the qualified electors of the State at the time and place of voting for representatives, for the term of four years; and in case of vacancy caused by death, resignation, permanent absence, or otherwise, of any of said officers, the Governor shall fill the vacancy by appointment, with the advice and consent of the Senate; Provided, the Secretary of State shall have authority to appoint an assistant, who shall be known as Assistant Secretary of State, and in the absence of the Secretary of State or in case of his disability to act, or under the directions of the Secretary of State, the Assistant Secretary of State shall have authority to perform all the acts and duties of the office of Secretary of State.

The Secretary of State shall have authority to remove the Assistant Secretary of State at pleasure.

Article 160:

Members of the General Assembly and all officers, before entering upon the duties of their respective offices, shall take the following oath or affirmation:

> **"I (A. B.), do solemnly swear (or affirm) that I will support the Constitution and laws of the United States and the Constitution and laws of this State; and that I will faithfully and impartially discharge and perform all the duties incumbent on me ..... according to the best of my ability and understanding. So help me God."**

EXTRACTS FROM THE SESSION LAWS OF LOUISIANA.

ACT NO. 54 OF 1904,

To carry into effect Article 264 of the Constitution of 1898, in respect to foreign corporations doing business in this State.

Section 1. **Be it enacted by the General Assembly of the State of Louisiana,** That it shall be the duty of every foreign corporation doing any business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality

of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.

Section 2. **Be it further enacted,** etc., That whenever any such corporation shall do **any business of any nature whatever in this State** without having complied with the requirements of Section 1 (one) of this act, it may be sued for any legal cause of action in any parish of the State where it may do business, and service of process in such suit may be made upon the Secretary of State the same and with the same validity, as if such corporation had been personally served.

Section 3. Be it further enacted, That all laws and parts of laws in conflict or inconsistent with this act, be and the same are hereby repealed.

ACT NO. 74 OF 1902,

Relative to the powers of railway corporations organized and existing under the laws of this State, or any other State or Territory or of the United States.

Section 8. **Be it further enacted, etc., that railroad** companies or corporations availing themselves of the provisions of this act, shall have and maintain a domicile and main and general office in this State and be subject to the control and regulations of the laws of this State and the Railroad Commission, as well as the jurisdiction of the State Courts.

EXTRACTS FROM THE REVISED STATUTES OF LOUISIANA.

Section 3522, R. S.:

The Secretary of State is hereby authorized to appoint an Assistant Secretary of State.

Section 3523, R. S.:

The Assistant Secretary of State, so appointed, shall, after having taken and subscribed the oath required by the Constitution of the State, be fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State, during the sickness or absence for any cause of the latter; and the Secretary of State alone shall be responsible for all acts so performed; said assistant shall also assist and aid in the performance of such duties pertaining to the office as may be required of him by the Secretary of State; and he shall receive as payment in full, for services thus rendered, the sum of two thousand dollars per annum, payable quarterly on his own warrant, approved by the Secretary of State.

EXTRACTS FROM THE CASE OF STATE OF LOUISIANA V. PHIL CLARK, ET AL., REPORTED IN VOLUME 46, LOUISIANA ANNUAL REPORTS, PAGES 1409-1412.

Syllabus: The certificate of the Assistant Secretary of State is competent evidence of the promulgation of a law.

The opinion of the Court was delivered by Watkins, J.

"Phil Clarke, Richard Wilson, Martin Jones, Julien Mullet and Edward Isaacs were indicted for a conspiracy to commit murder, and the last two, having been convicted and sentenced to the penitentiary, have appealed.

* * * * * * *

"Objections were made, however, by the State's Attorney to the admission in evidence of the certificate of the Assistant Secretary of State, and the objections having been sustained by the Court, the defendant's counsel retained the aforesaid bill and annexed the certificate thereto.

* * * * * * *

"The Civil Code provides that the Secretary of State 'shall keep a register in which he shall write down the title of all laws passed by the Legislature, together with the dates when they shall have been respectively published in the State paper; and the register thus kept or the **certificate delivered from the same,** by the Secretary of State, under his official signature and seal, shall be evidence of the publication of the laws,' etc.

Revised Civil Code, Art. 6; Revised Statutes, 3493.

"The Secretary of State is authorized to appoint an Assistant Secretary of State.

Revised Statutes, Sec., 3522.

"And the Assistant Secretary of State 'is fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State.' etc.

Revised Statutes, Sec., 3523.

"It is evident that the certificate of the Assistant Secretary of State was competent evidence for the purpose for which it was offered, and that rejecting it was error on the part of the trial Judge, which entitles the defendant to relief.

"Reversed and remanded."

EXTRACTS FROM THE CODE OF PRACTICE OF LOUISIANA.

Article 310, C. P.:

If the defendant do not appear either in person or by his advocate after the delay provided by law, the plaintiff may take a judgment by default against him.

Article 311, C. P.:

Such judgment may be obtained by moving for it in Court, but it consists merely in a statement on the records of the Court, showing that the defendant has failed to appear.

Article 312, C. P.:

If, two days after this first judgment has been rendered, the defendant neither appear nor file his answer, definite judgment will then be given for the plaintiff, provided he prove his demand. This proof is required in all cases.

Article 314, C. P.:

If the defendant, on the very day when a definitive judgment by default was to have been rendered against

him, appear and file his answer, the first judgment taken shall be set aside.

Article 360, C. P.:

When the defendant suffers judgment by default to be taken against him, the issue is joined tacitly, because such defendant is presumed by his silence to have confessed the justice of his adversary's demand; therefore the plaintiff is allowed to proceed with his proofs in order to have the judgment confirmed.

Article 546, C. P.:

The Judge must sign all definitive or final judgments rendered by him, but he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given; provided, that hereafter, (except in the Parish of Orleans), all motions for new trials in causes, shall be made and determined, and all final judgments signed before the adjournment of the Court, for the term at which such causes were tried, and whether three judicial days shall have elapsed or not.

Article 604, C. P.:

One may demand the nullity of a judgment for any of the causes provided in this section, even if no appeal have been taken from the same, or if the delay for taking the same have expired.

Article 605, C. P.:

The causes for which the nullity of a definitive judgment may be demanded are two-fold: those that are relative to the form of proceeding, and those that appertain to the merits of the question tried.

Article 606, C. P.:

The vices of form for which a judgment can be annulled are the following:

1. If a judgment has been rendered, even contradictorily, against a person disqualified by law from appearing in a suit, as a minor without the assistance of his curator or tutor, or a married woman without the authorization of her husband or of the Court;

2. If the defendant, although qualified to appear in a cause, have been condemned by default, without having been cited.

3. When the judgment, though clothed with all the necessary formalities, has, nevertheless, been given by a Judge incompetent to try the suit, either owing to the amount in dispute, or to the nature of the cause;

4. If the defendant has not been legally cited, and has not entered appearance, joined issue, or had not a regular judgment by default taken against him.

Article 607, C. P.:

A definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud or other ill practices on the part of the party in whose favor it was rendered; as if he had obtained the same by bribing the judge or the witnesses, or by producing forged documents, or by denying having received the payment of a sum, the receipt of which the defendant had lost or could not find at the time, but was found since the rendering of the judgment.

Article 608, C. P.:

The nullity of judgment may be demanded from the ame Court which has rendered the same, or from the ourt of appeal before which the appeal from such judgnt was taken, pursuant to the provisions hereafter exressed.

Article 611, C. P.:

Though there has been no appeal within the delay prescribed by law, the nullity of the judgment may yet be demanded by means of an action brought before the Court which has rendered the same, within the delay hereafter provided.

Article 612, C. P.:

The nullity of a judgment rendered against a party without his having been cited, or by an incompetent Judge, even if all the formalities of the law have been observed, may be demanded at any time, unless the defendant were represented in the parish, and yet suffered the judgment to be executed without opposing the same.

The same rule should govern, as regards a defendant not qualified to appear in a suit where judgment has been given against him, if he suffer the judgment to be executed against his property without opposing the same.